Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

HORIZON WEST, INC., *et al.*,
Petitioners,

v.

UNITED STATES *ex rel.* FOUNDATION AIDING THE ELDERLY AND MARSHA J. BAKER,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The False Claims Act permits certain so-called *qui tam* actions, but forbids jurisdiction over any action that is "based upon the public disclosure of allegations or transactions" in certain fora. 31 U.S.C. § 3730(e)(4)(A). This case raises the following question:

> Whether Section 3730(e)(4)(A)'s jurisdictional bar applies where a *qui tam* relator relies on publicly disclosed information concerning impropriety or wrongdoing on a defendant's part?

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

Petitioners, defendants-appellees below, are Horizon West, Inc. and an extensive list of directly or indirectly wholly owned subsidiaries. More specifically, petitioners are the following: (a) Horizon West, Inc., which does not have a parent company; (b) Auburn Manor, Inc. (formerly dba Parkview Nursing Center), Emerald Distributing Company, Inc., Empress Convalescent Hospital, Inc., Far West, Inc., Horizon West Headquarters, Inc., Sierra Health Care Management Corporation dba Sierra Health Care Convalescent Hospital, Sierra Medical Enterprises, Inc., Sierra Solano Care Center, Inc., and Westcare Management, Inc., the parent company of each of which is Horizon West, Inc.; (c) El Dorado Convalescent Hospital, Inc., Foothill Oaks Care Center, Inc., Hilltop Manor Convalescent Hospital, Inc., Lakeport Skilled Nursing Center, Inc., Lincoln Manor, Inc., Live Oak Manor, Inc., Meadow View Manor, Inc., Monterey Pines Skilled Nursing Facility, Inc., Napa Nursing Center, Inc., Placerville Pines Convalescent Hospital, Inc., Roseville Convalescent Hospital, Inc., Sierra Hills Care Center, Inc., Sunny Hills Convalescent Hospital, Inc., Valley View Skilled Nursing Center, Inc., and Walnut Whitney Convalescent Hospital, Inc., the parent companies of each of which are Sierra Medical Enterprises, Inc. and Horizon West, Inc.; (d) Linwood Gardens Convalescent Hospital, Inc., Medicrest of California, Inc. dba Medical Center Convalescent Hospital, Medicrest of California 1, Inc. dba Arlington Gardens Convalescent Hospital and Montclair Manor Convalescent Hospital, Mid-Wilshire Convalescent Hospital, Inc., Sacramento Convalescent Hospital, Inc., South Gate Care Center, Inc. dba Casa del Rey Care Center, Vallejo Convalescent Hospital, Inc. dba Sereno Care Center, Westgate Gardens, Inc., and Whitehall Convalescent Hospital, Inc. dba Wellesley Manor Convalescent Hospital, the parent companies of each of which are Far West, Inc. and Horizon West, Inc.; (e) Four

Corners Regional Care Center, Inc., Parkdale Care Center, Inc., Red Cliffs Regional, Inc. dba Red Cliffs Convalescent and Rehabilitation Center, and Sandy Regional, Inc. dba Sandy Regional Convalescent & Rehabilitation Center, the parent companies of each of which are Westcare Management, Inc. and Horizon West, Inc.; (f) Heritage Convalescent Hospital, Inc., the parent companies of which are Auburn Manor and Horizon West, Inc.; (g) Holiday Hills Convalescent Hospital, Inc. ("Holiday Hills") dba Grass Valley Convalescent Hospital, sued erroneously as Sierra Medical Enterprises, Inc. dba Grass Valley Convalescent Hosp., the parent companies of Holiday Hills being Re-Peg Management, Inc. (whose own parent company is Sierra Medical Enterprises, Inc.), Sierra Medical Enterprises, Inc., and Horizon West, Inc.; and (h) Monterey Bay Convalescent Hospital, Inc., which was dissolved in 1994 and whose parent company was Far West, Inc. No publicly held company owns 10% or more of the stock of any of the foregoing corporations.

Respondents, relators-appellants below, are Foundation Aiding the Elderly and Marsha J. Baker.

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Petitioners, Horizon West, Inc. and its subsidiaries, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, *see infra* Appendix to Petition ("Pet. App.") 1a-9a, is reported at 265 F.3d 1011 (9th Cir. 2001). The opinions of the district court, Pet App. 10a-29a & 31a-37a, are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2001. Pet. App. 2a, 43a. A timely petition for rehearing was denied on December 21, 2001. Pet. App. 40a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This petition presents an important question concerning the proper interpretation of Congress's jurisdictional grant to the federal courts to hear so-called *qui tam* claims. *Qui tam* actions are authorized by the False Claims Act, 31 U.S.C. §§ 3729-3733. Essentially, this Act permits a private individual (frequently termed a "relator") to bring suit against an entity that the relator has reason to believe has defrauded the federal government. *See id.* § 3730(b)(1). This action is brought in the name of the United States and must be initially served on the United States, together with "written disclosure of substantially all material evidence and information the [relator] possesses," *id.* § 3730(b)(2), which is frequently termed a "Disclosure Statement." The United States then has the option of intervening in the action; if it elects not to do so, the relator may proceed by itself.

In enacting the False Claims Act, Congress recognized the potential for abuse of *qui tam* actions—for example, the possibility that private individuals would file *qui tam* actions

even where they relied on matters already known to the public. Congress thus limited the scope of *qui tam* actions as follows:

> No court shall have jurisdiction over an action under this section *based upon the public disclosure of allegations or transactions* in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A) (emphasis added). It is this jurisdictional bar on *qui tam* actions that is at issue here.

STATEMENT

In this case, the Ninth Circuit adopted an interpretation of Section 3730(e)(4)(A) that greatly expands the scope of the *qui tam* action by permitting relators to bring such an action even where the essential underlying information concerning a defendant's asserted wrongdoing or impropriety was previously publicly disclosed and where relators themselves have no additional information suggesting that the United States has been defrauded. The Ninth Circuit's approach to Section 3730(e)(4)(A) had previously been invented by the D.C. Circuit and adopted by the Eighth Circuit, but is contrary to the approach taken by the Second, Third, Sixth, and Tenth Circuits. These latter circuits—consistently with the plain language of the statute—dismiss as barred *qui tam* suits brought by relators that rely on publicly disclosed information of a defendant's wrongdoing.

To place the issues in this case in context, it is necessary to set forth (1) the federal regulatory scheme to which petitioners and other nursing homes are subject, insofar as it is relevant here, (2) the particular contentions of the *qui tam* relators in this case, (3) the dismissal of the case in the district court, and (4) the reversal of that decision by the Ninth Circuit.

1. The Regulatory Scheme Governing Skilled Nursing Facilities. Petitioners operate skilled nursing facilities, which provide care to individuals in need of continuing nursing care. Skilled nursing facilities are subject to extensive regulation by the federal and state governments, partly because of their participation in the Medicare and Medicaid programs.

One component of this oversight is regulation by the Health Care Financing Administration ("HCFA"), an agency within the federal government's Department of Health and Human Services. *See generally* 42 U.S.C. § 1395i *et seq.* (Medicare); *id.* § 1396r *et seq.* (Medicaid).[1] HCFA contracts with state agencies to monitor the compliance of skilled nursing facilities with federal regulations. *Id.* § 1395i-3(g)(1)(A). Thus, skilled nursing facilities must undergo a federally mandated certification and inspection, called a "survey," at least once every 15 months. *Id.* § 1395i-3(g)(2)(A)(i), (iii); 42 C.F.R. § 488.308(a). These surveys include unannounced inspections and investigations of complaints. Generally, each survey consists of the surveyors' spending several days in each facility, observing the conditions in the facility and the care given to residents, interviewing staff and residents, and reviewing medical records. *See* 42 C.F.R. § 488.110.

The result of each survey is a detailed written report, called a "HCFA-2567," in which the surveyors document alleged violations of federal regulatory standards and, where applicable, make conclusions in the form of a "statement of deficiencies." 42 C.F.R. § 488.18. The skilled nursing facility that is the subject of a particular survey must implement a "plan of correction" to remedy any regulatory violation that is reflected in the report. *Id.* § 488.402(d). In addition, the report must be made available to the public at

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[1] Although HCFA was recently renamed the Centers for Medicare & Medicaid Services, *see* 66 Fed. Reg. 35437-03 (July 5, 2001), we will use the more familiar name.

the state agency, 42 U.S.C. § 1395i-3(g)(5)(A), and to residents at the skilled nursing facility itself, 42 C.F.R. § 483.10(g)(1); *see also id.* § 488.325(a) (general requirement of public availability).

2. Commencement of This Action. This is a *qui tam* action commenced by a group that bills itself as an advocacy group for nursing home residents and their families. As summarized by the district court, "[t]he gravamen of relators' qui tam claim is that the management and staff at defendants' skilled nursing facilities engaged in widespread and intentional falsification of patient records in order to conceal substandard service delivery, and thereby profit by receiving federal monies without having provided the requisite services." Pet. App. 22a-23a. The United States declined to intervene in the action.

Relators' claims derived from the federally mandated surveys discussed above. For example, the Disclosure Statement that relators were required to file along with their complaint, *see* 31 U.S.C. § 3730(b)(2); *supra* p. 1, does not detail allegations received from relators, but rather quotes at length from publicly available HCFA-2567s and similar materials. In these circumstances, petitioners moved to dismiss for lack of subject-matter jurisdiction, arguing that "[t]he critical elements of the relators' claims of fraud . . . had been made public by the government's own previously publicly disclosed surveys and citations." CA9 Excerpts of Record 134.

3. The District Court's Decision. The district court granted petitioners' motions to dismiss for lack of federal jurisdiction. Pet. App. 28a, 30a. The court concluded that the action was barred by 31 U.S.C. § 3730(e)(4)(A)—that is, that it was "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media." In reaching its decision, the district court addressed several components of this statutory bar on jurisdiction.

The court addressed first what it termed the matter of "public disclosure." Pet. App. 16a-24a. It began by concluding that various pre-existing disclosures at issue in this case in fact occurred in an "administrative hearing, . . . [an] administrative, or Government Accounting Office report, hearing, audit, or investigation, or [in] the news media." *Id.* at 17a. These included the state administrative reports prepared pursuant to federal law requiring surveys or inspections of facilities participating in Medicaid and Medicare programs. *See id.* at 21a-22a & n.16.

The district court then turned to the question of whether these previously disclosed materials contained the same "allegations or transactions" as were the subject of relators' *qui tam* action. The court ultimately concluded that the allegations in relators' complaint had been publicly disclosed.[2] It explained that "[r]elators' complaint does no more than draw an inference of fraud from information previously disclosed in public documents." *Id.* at 35a. The court concluded that where "a relator adds no substantive information [but] merely assembles . . . information [already in the public domain] and draws inferences therefrom," the information in the complaint consists of "allegations or transactions" that have already been publicly disclosed. *Id.* at 35a-36a (internal quotation marks omitted).

The court finally discussed whether the relators' allegations were "based upon" the pre-existing disclosures. In making this determination, the court focused on what the relators knew when they filed the complaint. The court observed the following concerning relators' Disclosure Statement:

> While the 154-page Disclosure Statement provides greatly detailed allegations of substandard medical care at defendants' facilities, the Statement reports no

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[2] We say "ultimately" because the district court modified its rationale upon reconsideration, but confirmed its previous order granting defendants' motion to dismiss. Pet. App. 34a-36a.

> specific knowledge or information about falsification of records or fraud on the government. Even in a subsection of the Statement entitled "Examples of Company-Wide Falsifications and Non-Compliance," relators only generally plead that "defendants have maintained, and continue to maintain, a company-wide custom and practice of falsifying the activities of daily living ('ADLs') for the various residents to conceal the lack of care and services required."

Pet. App. 25a. The court proceeded to demonstrate—based on the record created in discovery and on relators' concessions—that "at the time they filed their sealed complaint and Disclosure Statement with the government, [relators] possessed no independent knowledge of any falsification of records or fraudulent practices by the defendants." *Id.*

As for relators' claim that "their assertion of record falsification or company-wide fraud was based upon an *inference* drawn from the state audits and their own direct observations of substandard care," the court rejected this as insufficient to withstand the jurisdictional bar. *Id.* (emphasis added). This was so, the court stated, because (under the decisions of various federal courts of appeals) "[a] relator may not simply speculate about the existence of a fraudulent transaction based upon publicly disclosed material" but must rather provide "substantive information about the particular fraud" in order to go forward. *Id.* at 26a (internal quotation marks omitted).

In short, the court concluded that "[b]ecause relators have not come forward with any independent evidence to dispute that their allegations must have been 'based upon' publicly available documents, the public disclosure provision bars their claims of fraud." *Id.* Accordingly, the district court dismissed the relators' action as barred by Section 3730(e)(4)(A). On relators' motion for reconsideration, the district court adhered to its dismissal of relators' action. Pet. App. 36a; *see supra* p. 5 n.2.

4. The Court of Appeals' Decision. Relators appealed to the Ninth Circuit. In reversing, the Ninth Circuit did not address the primary argument raised by relators: "whether the publicly-disclosed surveys at issue qualify as public disclosures as defined in the statute." Pet. App. 5a. The court concluded that "[w]e need not answer that question today." *Id.* at 6a. "That is so," the court stated, "because, even assuming that the surveys do qualify as public disclosures, the action is still not barred because none of the disclosures in the surveys or any of the other disclosures reveal either the allegations or transactions at issue in this case." *Id.*

The court bifurcated its inquiry as to whether any public disclosure had "reveal[ed] the 'allegations or transactions' underlying Appellants' complaint." *Id.* The court stated that with respect to the first component of this phrase, it was required to address "whether *allegations of fraud* were previously disclosed." *Id.* (emphasis added to "of fraud"). Thus, it characterized its task as "[to] determine whether there was a public disclosure of fraud which was 'substantially similar to those disclosed in the earlier . . . action.'" *Id.* (quoting *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1033 (9th Cir. 1998)). With respect to the other component of the statute—"whether the *transactions* underlying a relator's complaint were publicly disclosed"—the court "adopt[ed] the analysis first laid out by the [D.C. Circuit]: '[I]f X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed.'" Pet. App. 6a (quoting *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994)). "[I]n a fraud case," the Ninth Circuit concluded, "X and Y inevitably stand for but two elements: 'a misrepresented state of facts and a true state of facts.'" *Id.* (quoting *Quinn*, 14 F.3d at 655).

In its application of these principles to the facts of this case, the court deployed the essential reasoning of this "X + Y = Z" test both to determining whether there had been prior public disclosure of "allegations" and to determining whether there had been prior public disclosure of "transactions." The court of appeals required, with respect to both, that any prior public disclosure have revealed both "a misrepresented state of facts and a true state of facts," *id.* (internal quotation marks omitted), else it would conclude that the jurisdictional bar was not triggered.

The Ninth Circuit first considered whether there was prior public disclosure of "allegations" which barred relators' *qui tam* action. Pet. App. 7a-8a. It concluded that materials in various state-court lawsuits and a newspaper article to which petitioners pointed did not constitute "allegations" within 31 U.S.C. § 3730(e)(4)(A) because they did not assert all the elements of fraud. "What is conspicuously missing from [these documents]," the court stated, "are any allegations that the named defendants misrepresented the level of care to the government and received payment for that alleged substandard care." Pet. App. 7a. For the court of appeals, it was dispositive that, "at most, th[e] [prior] allegations only disclose the true set of facts" (*id.*) and not also a misrepresented state of facts, as would be required for fraud. Under this reasoning, it was thus of no consequence to the court that these prior disclosures raised assertions of wrongdoing or impropriety against petitioners. The court did not consider the HCFA surveys at all in this part of its opinion.

The court next considered whether "[e]ven if the above *allegations* did not specifically identify the fraud at issue, the action may still be barred if some disclosures revealed the *transactions* underlying the fraud." Pet. App. 8a. Here, the court finally acknowledged the government-conducted surveys, stating that they were "the primary source which could potentially reveal the underlying fraudulent transactions." *Id.* at 9a. Indeed, the court noted that "[t]he Second Amended

Complaint specifically alleges instances of substandard care against 17 defendants" and that "[t]he great majority of these specific allegations *are taken from the surveys*." *Id.* n.6 (emphasis added). The court nonetheless concluded that these materials were not prior disclosures barring relators' action because the surveys disclosed only "the true state of fact" (*viz.*, "that the defendant provided substandard care") and not "a misrepresented state of fact." *Id.*[3] Having concluded that there had not been prior public disclosure of the "allegations or transactions" in relators' complaint, the court of appeals reversed the district court's dismissal of this action and did not find it necessary to discuss whether relators' action was "based upon" such prior public disclosures.

On petitioners' request for rehearing and rehearing en banc, the court of appeals corrected several typographical errors in its opinion but denied rehearing. Pet. App. 38a-40a.

REASONS FOR GRANTING THE PETITION

Congress enacted a statutory bar on federal court jurisdiction over *qui tam* actions that are "based upon the public disclosure of allegations or transactions [in certain fora]." 31 U.S.C. § 3730(e)(4)(A). In interpreting this statute, the Ninth Circuit (like the D.C. Circuit before it in *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (1994)) has required that there be some pre-existing public allegation *of fraud* against a defendant to trigger the bar. This is not the ordinary and common-sense meaning of "allegations." It should rather be enough, for Section 3730(e)(4)(A) to be implicated and a *qui tam* action to be barred thereby, that there were pre-existing public

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[3] Though not precisely specified here by the Ninth Circuit, the allegedly "misrepresented state of fact" asserted by relators could be fairly described as a representation by defendants in seeking Medicare and Medicaid reimbursement "that they provided care in compliance with the federal regulations." CA9 Excerpts of Record 151 (Defendants' Joint Mem. in Support of Motion to Dismiss).

assertions of wrongdoing or impropriety on a defendant's part that are then relied upon in support of the *qui tam* action. This approach is more faithful to the text of the particular disputed language in the statute and to the structure of the statute. It is also more faithful to the purpose of the False Claims Act, which is (at least in part) designed to encourage relators to bring to light *information* that has not previously been made public. *See infra* Part I.

Furthermore, the interpretation of the D.C. Circuit and the Ninth Circuit, though consistent with that of some other circuits, is in conflict with the approach routinely deployed by the Second Circuit and the Third Circuit in *qui tam* suits. These courts have given the word "allegations" in Section 3730(e)(4)(A) its common-sense meaning of assertions of wrongdoing or charges of impropriety. Thus, in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993), it was enough to bar jurisdiction that the *qui tam* relator based his action in part upon discovery material from a previous lawsuit against the same defendant, even though there was no indication that the previous lawsuit (a wrongful-death action) involved any allegation *of fraud*. It was enough, in other words, that plaintiff relied upon publicly available *information adverse to the defendant*. The Third Circuit's decision in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991), is to the same effect. These decisions are routinely relied upon within their respective circuits by district courts in dismissing *qui tam* actions. The bottom line thus is that cases such as the instant one go forward in some circuits (those following the *Quinn* approach) and are dismissed in others. Whichever view is correct, only this Court, by granting review to resolve the conflict, can provide the uniformity throughout the Nation that is particularly appropriate for threshold questions of jurisdiction. *See infra* Part II.

Finally, review is especially appropriate because, in cases such as this, the *Quinn* test fails to achieve its own stated purposes. *Quinn* recognized that Section 3730(e)(4)(A)'s jurisdictional bar was designed to ensure that a relator "'possess[es] substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation.'" 14 F.3d at 655 (quoting *Stinson*, 944 F.2d at 1160). In this and analogous cases, however, relators brought no substantive information to the attention of the government, but merely have deployed their knowledge of nursing care facilities and the federal regulatory scheme for reimbursing those facilities for Medicaid and Medicare expenses, in combination with publicly disclosed information in the HCFA audits or surveys, to maintain an opportunistic action. A test such as *Quinn* that fails in numerous cases to achieve its stated purpose should not be unthinkingly applied in each case, as is now occurring in several circuits. *See infra* Part III.

I. THE NINTH CIRCUIT AND THE D.C. CIRCUIT HAVE MISINTERPRETED AND IMPROPERLY LOWERED THE JURISDICTIONAL BAR IN THE FALSE CLAIMS ACT BY REQUIRING PRIOR PUBLIC DISCLOSURES TO INCLUDE SPECIFIC ALLEGATIONS OF FRAUD.

The Ninth Circuit observed that it was adopting the D.C. Circuit's reasoning in *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994). Specifically, the court here stated that, to determine whether the jurisdictional bar applied, it had to inquire whether the public disclosures revealed both "'a misrepresented state of facts and a true state of facts,'" which are the two elements of fraud. Pet. App. 6a (quoting *Quinn*, 14 F.3d at 655). Only if documents disclosed publicly prior to the litigation contained both

of these matters, this reasoning goes, can it be said that the documents contained the same "allegations or transactions" as the relators' complaint.

The Ninth Circuit correctly represented the D.C. Circuit's reasoning in *Quinn*. There the court stated that there is "a distinction between 'allegations or transactions' and ordinary 'information' as a matter of common usage and sound interpretation of the [False Claims Act]." 14 F.3d at 653. Only where the former have been disclosed are *qui tam* suits barred. Moreover, the court reasoned, only when *all* the "essential elements" of fraud have been disclosed can it be said that there has been an "allegatio[n]" of fraud. *Id.* at 654. Under this reasoning, the Ninth Circuit was correct to reverse the district court's dismissal, so long as one agrees that the only material in the public disclosures was the provision of substandard care (the "true state of facts," in the D.C. Circuit's terminology) and nothing else (including the "misrepresented state of facts").

But the D.C. Circuit's interpretation of Section 3730(e)(4)(A) in *Quinn* is not correct. The statute nowhere provides that *qui tam* actions are barred only if the specific allegations of fraud have been raised elsewhere. It rather states that they are barred if they are "based upon the public disclosure of allegations or transactions" elsewhere. 31 U.S.C. § 3730(e)(4)(A). Even if the focus is maintained on the word "allegations" for the moment, it is wrong to conclude this word should be interpreted to mean specific allegations *of fraud*, including *all* the essential legal elements of that cause of action.

The word "allegation" means "something asserted or declared." *Webster's Third New International Dictionary* 55 (1971). The term is *not*—either in common or legal parlance—limited to statements of *all elements* of causes of action (e.g., fraud). Thus, particular underlying facts—that do not themselves constitute the entirety of a cause of

action—frequently are said to be "alleged." *See, e.g., Correctional Servs. Corp. v. Malesko*, 122 S. Ct. 515, 518 (2001) ("Respondent alleges that on March 28, 1994, however, Jorge Urena, an employee of petitioner, forbade him to use the elevator to reach his fifth-floor bedroom."); *Southern Ry. v. King*, 217 U.S. 524, 538 (1910) (Holmes, J., dissenting) (recounting "pure allegations of fact" that had been made in the case); *see also* Fed. R. Civ. P., App., Form 2 (giving examples of "[a]llegation of [j]urisdiction"); *id.*, Form 26 (giving example of "[a]llegation of [r]eason for [o]mitting [p]arty" pursuant to Rule 19(c)).

If the word "allegations" is so interpreted in Section 3730(e)(4)(A) of the False Claims Act—that is, if it is interpreted to encompass assertions of fact as well, at least where they reflect adversely on the entity against which they are made—then the D.C. Circuit's (and by extension the Ninth Circuit's) interpretation of Section 3730(e)(4)(A)'s jurisdictional bar is incorrect. Under this approach, the surveys to which petitioners point as constituting the "public disclosures" in fact contain some of the same "allegations" as relators' complaint, for the surveys (even by the Ninth Circuit's description) contain numerous instances of substandard care. Indeed, that this is the superior interpretation of the term "allegations or transactions" in the statute would seem to be established by the Ninth Circuit's own statements that "[t]he Second Amended Complaint specifically *alleges* instances of substandard care against 17 defendants" and that "the great majority of these specific *allegations* are taken from the surveys." Pet. App. 9a n.6 (emphasis added). Thus, while the Ninth Circuit asserts that prior public disclosures do not contain "allegations" within the meaning of the False Claims Act unless they actually contain *all* elements of fraud, this assertion is contradicted by the fact that the court otherwise demonstrates (through the material quoted in the

foregoing sentence) that the word "allegations" properly possesses a different and broader meaning that includes simply assertions of wrongdoing or impropriety.

This conclusion is strengthened when the remainder of Section 3730(e)(4)(A) is considered. First, the jurisdictional bar applies to actions "*based upon* the public disclosure of allegations or transactions" in certain other fora. 31 U.S.C. § 3730(e)(4)(A) (emphasis added). Congress did not state that an action had to be the same as, or be identical to, or be comprised of, or mirror the allegations made elsewhere; it rather is enough that the action is "based upon" those allegations. *Compare* 17 U.S.C. § 106(2) (copyright owner has right "to prepare derivative works based upon the copyrighted work").

Second, this jurisdictional bar uses the term "information" in specific reference to "allegations or transactions," thus suggesting that Congress did not intend to require that the "allegations" be "allegations *of fraud*," as the court of appeals held here. Specifically, the jurisdictional bar provides that "[n]o court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in [certain fora], unless the action is brought by the Attorney General or the person bringing the action is an original source of *the information*." *Id.* (emphasis added). Given the incontestable fact that the term "the information" is a reference back to "allegations or transactions," this reference makes clear that the statutory term "allegations" describes the underlying factual allegations, *not* the legal elements of a cause of action. Thus, the structure of the statute—in addition to the plain language as demonstrated above—suggests that Congress did not intend to bar actions only where there is some previous allegation *of fraud*, as the Ninth Circuit here concluded. It rather should be enough, as Congress saw it, that there is prior public disclosure of adverse information upon which the *qui tam* claims are "based."

Although it is not dispositive, a statement by this Court supports this interpretation. In *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997), the Court considered whether Section 3730(e)(4)(A)—the very provision at issue here—applied to conduct before its enactment in 1986. In introducing the retroactivity question that was at the center of that case, this Court described Section 3730(e)(4)(A) as barring jurisdiction over a *qui tam* suit "where the suit was based on *information* that had been publicly disclosed." *Hughes Aircraft Co.*, 520 U.S. at 946 (citing 31 U.S.C. § 3730(e)(4)(A)) (emphasis added). This dictum is offered not to suggest that this Court has resolved the issue, but to demonstrate further that the common-sense reading of the jurisdictional bar does not limit its scope to situations where there is a pre-existing, identical allegation *of fraud*.[4]

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[4] It also merits mention that the United States has endorsed an interpretation of Section 3730(e)(4)(A) under which "allegations or transactions" may bar jurisdiction even where the allegations are not *of fraud* but rather "merely" consist of important information that is adverse to a defendant. Specifically, the government has argued in at least one court of appeals that Section 3730(e)(4)(A) precludes jurisdiction over a *qui tam* action brought by a former government employee based upon information obtained in the course of the former government employment. The United States' essential theory has been that "when the government employee uses official information as a private citizen, he has disclosed the information to himself so that a 'public disclosure [of allegations or transactions]' occurs." *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499 (11th Cir. 1991). Although the Eleventh Circuit rejected the United States' argument, it did so primarily because Section 3730(e)(4)(A) "bars actions based upon information that is publicly disclosed *only in certain enumerated instances*" (*i.e.*, "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media"), none of which was present in the situation of a government employee's disclosing something to himself. *Id.* (emphasis added). The salient point is that, as far as the *Williams* case reveals, the government's contention was not that the former-government-employee relator there had lifted allegations *of fraud* from material prepared while

The conclusion is strengthened still further when one considers the fundamental proposition that, as a jurisdictional provision, Section 3730(e)(4)(A) is "to be strictly construed, and doubts resolved against federal jurisdiction." *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548, 552 (10th Cir. 1992) (relying on this proposition in interpreting another aspect of § 3730(e)(4)(A)); *compare Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (noting that "[i]t is to be presumed that a cause lies outside [the federal courts'] limited jurisdiction") (and cases cited). Thus, where petitioners require no narrow construction, but only a construction of Section 3730(e)(4)(A) based on the ordinary meaning of its words, to demonstrate the absence of a congressional grant of jurisdiction (indeed, the presence of a congressional *bar* on jurisdiction), the impropriety of the Ninth Circuit's approach is clear.

Finally, petitioners appreciate that the term "allegations or transactions" in Section 3730(e)(4)(A) must be read in context and that Congress presumably did not mean to use the term synonymously with the word "information." Thus, it is true that "[c]ourts sometimes speak loosely of barring a *qui tam* suit because it is based on 'publicly disclosed information,' [but] the Act bars suits based on publicly disclosed 'allegations or transactions,' not information." *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992). Petitioners, however, place no reliance on any instances of "loos[e]" language by courts of appeals (either here or in Part II where petitioners demonstrate that the D.C./Ninth Circuit interpretation rebutted here is also in conflict with the approach of certain other courts)—although petitioners do pause to suggest that the fact that so many

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he was an employee, but rather that he had used "official information outside the scope of his employment" (*id.*) and thus made a public disclosure (to himself) of "allegations or transactions" within the meaning of 31 U.S.C. § 3730(e)(4)(A).

courts so characterize Section 3730(e)(4)(A) serves to demonstrate that, under the natural reading of the provision, allegations *of fraud* are not required and that assertions of adverse information or impropriety short of fraud are sufficient to trigger the bar.[5] Rather, petitioners place reliance on the plain language of the statute, which does not require allegations *of fraud* (including all of its essential elements) to trigger Section 3730(e)(4)(A)'s jurisdictional bar, and on its structure, which also militates against the court of appeals' interpretation here. When given its plain meaning and read in context, the jurisdictional bar is implicated where a relator uses a prior public assertion of wrongdoing or impropriety against a defendant as part of the basis for a *qui tam* suit. There were such "allegations" in this case (in the surveys conducted as part of the Medicaid and Medicare programs), and Section 3730(e)(4)(A), properly interpreted, should have been held to preclude jurisdiction in the district court over relators' action.

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[5] *See, e.g., United States ex rel. Grayson v. Advanced Mgmt. Tech., Inc.*, 221 F.3d 580, 582 (4th Cir. 2000) (Section 3730(e)(4)(A) bars jurisdiction over "qui tam complaint [if it] was 1) 'based upon' information 2) that was 'publicly disclosed' and 3) [relators] were not the 'original source' of this information"); *United States ex rel. Taxpayers Against Fraud v. GE Co.*, 41 F.3d 1032, 1035 (6th Cir. 1994) ("the relator must be a true 'whistleblower'; therefore, he is precluded from collecting a bounty if the case is brought on the basis of information that has already been publicly disclosed, [31 U.S.C.] § 3730(e)(4)"); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990) ("if the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred"); *Houck on behalf of United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504 (7th Cir. 1989) (jurisdiction barred because "the information upon which Houck based his complaint was publicly disclosed").

II. THE APPROACH OF THE NINTH CIRCUIT AND THE D.C. CIRCUIT IS IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS (MOST NOTABLY THE SECOND AND THIRD, BUT ALSO THE SIXTH AND TENTH), WHICH DO NOT REQUIRE AN ALLEGATION OF FRAUD TO TRIGGER THE JURISDICTIONAL BAR.

Petitioners submit that, given the importance of the False Claims Act, the misinterpretation of the Act's jurisdictional bar by two federal courts of appeals is an adequate basis for this Court's exercise of certiorari.[6] But this petition does not merely present a question of statutory (mis)interpretation. It also presents a case where certain other federal courts of appeals have interpreted the statute along the lines of petitioners' foregoing argument and thus are in conflict with the D.C. Circuit and the Ninth Circuit.

Simply put, the dismissal of relators' *qui tam* action would have been affirmed in certain other federal courts of appeals. Particularly where one of the most fundamental components of a congressional act—the extent to which it grants jurisdiction to the federal courts—is interpreted inconsistently across the Nation, it is appropriate for this Court to resolve the dispute.

The decision of the Second Circuit in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir. 1993), is a particularly instructive counter-

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[6] The focus here has been on the D.C. Circuit and the Ninth Circuit, the former because it first expounded the "X + Y = Z" test (or, put alternatively, the requirement that "allegations" in Section 3730(e)(4)(A) be allegations *of fraud*) and the latter because it followed that test here and entered the judgment below. The Eighth Circuit has also adopted and applied this erroneous approach from *Quinn*. *See United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1512 (8th Cir. 1994). As developed in this Part, courts in the Second and Third Circuits routinely, and in the Sixth and Tenth Circuits in some cases, have conflicted with this approach of the D.C., Eighth, and Ninth Circuits.

example. Demonstrating the point requires describing this decision in some detail, but it will become clear that the Second Circuit's interpretation of Section 3730(e)(4)(A) is inconsistent with that of the D.C. and Ninth Circuits. *Cf. Hindo v. University of Health Sciences*, 65 F.3d 608, 610 (7th Cir. 1995) (observing that "[a]s with most False Claims Act cases, this case is heavily dependent on its facts, which we will now undertake to recite in unfortunate detail").

Relator in *Kreindler* was an attorney who had previously represented Audrey Bryant, a widow of a United States Army officer, in a wrongful-death action brought against United Technologies Corp. ("UTC") as a result of a crash involving a Black Hawk helicopter manufactured by UTC. After the *Bryant* wrongful-death action resulted in a settlement, Kreindler filed a *qui tam* action against UTC, "contending that UTC knowingly violated its government contract and presented false or fraudulent claims for payment [for] over 700 Black Hawk helicopters delivered to the United States Army without blade fold pins, a contractually required and critical safety and performance feature." *Kreindler*, 985 F.2d at 1152. Kreindler based his *qui tam* action upon information that UTC had produced in discovery in the *Bryant* wrongful-death action.

The Second Circuit affirmed the district court's dismissal "because Kreindler's *qui tam* action is 'based upon the public disclosure of allegations or transactions' in the *Bryant* action within the meaning of § 3730(e)(4)(A)." 985 F.2d at 1159. The court agreed with UTC that it was enough to bar jurisdiction "that discovery material containing all of the *information* upon which Kreindler's claim is based was filed with the district court in the *Bryant* litigation" and that "the *information* was available to anyone who wished to consult the court file." *Id.* at 1157-58 (emphasis added). It is essential to appreciate that this information whose prior disclosure barred Kreindler's *qui tam* action was *not* some particular allegation of fraud, as would have been required under the D.C. Circuit's

opinion in *Quinn* and the Ninth Circuit's decision in the instant case, but rather was information concerning UTC's course of conduct in delivering Black Hawk helicopters to the United States government.

The case at bar is materially indistinguishable from the *qui tam* action held in *Kreindler* to be precluded by Section 3730(e)(4)(A). To be sure, the particular facts differ, as do the facts of almost any two *qui tam* cases, but the essential context is identical: in both instances, there was prior public disclosure, not of allegations of fraud, but of information that reflected adversely upon a particular entity—in this case, the HCFA surveys with respect to petitioners and in *Kreindler* the documents concerning UTC's conduct with respect to the Black Hawk helicopter. Nonetheless, the dispositions of the two cases are diametrically opposed to one another, with the Ninth Circuit here permitting relators' *qui tam* action to proceed and the Second Circuit there prohibiting relator's *qui tam* action from going forward. This is because, unlike the D.C. and Ninth Circuits, the Second Circuit has not read the phrase "allegations" in Section 3730(e)(4)(A) necessarily to mean "allegations of fraud," but rather has given the phrase its common-sense meaning of assertions of wrongdoing or charges of impropriety.

Despite its variance from the D.C. Circuit and the Ninth Circuit, the Second Circuit is not alone in its interpretation of the jurisdictional bar. The Third Circuit followed the same basic approach in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149 (3d Cir. 1991). The *qui tam* action in *Stinson* asserted that Prudential had defrauded the federal government by avoiding its statutory responsibility to pay certain insurance claims as the primary insurer. The court of appeals affirmed the district court's dismissal of this action against Prudential under Section 3730(e)(4)(A) because it was based upon material that had been disclosed during discovery in a previous lawsuit. Notably, this previous lawsuit did not involve an

allegation of fraud against Prudential—indeed, it was a lawsuit brought by *another* insurance company (Provident) against one of its insureds, in which Provident sought a declaratory ruling that its particular claims procedure was lawful. Discovery materials produced in this prior lawsuit included the hand-written results of a telephone survey undertaken by Provident concerning the claims-processing practices of other insurance companies. In these results, a Provident employee had noted this of Prudential's response to the telephone survey concerning its claims procedure: "Left message—Same as us." *Stinson*, 944 F.2d at 1151. When Stinson (the law firm representing the defendant insured in Provident's action) subsequently brought a *qui tam* action against Prudential based upon this information, it was enough to satisfy Section 3730(e)(4)(A) ("based upon the public disclosure of allegations or transactions") that "Stinson acquired the *information* upon which it based its *qui tam* complaint through the material produced by Provident in discovery." *Stinson*, 944 F.2d at 1160 (emphasis added).

Thus, in *Stinson*, the court of appeals imposed no requirement remotely comparable to the D.C. Circuit's approach in *Quinn* and the Ninth Circuit's here. Rather, like the Second Circuit in *Kreindler*, the Third Circuit in *Stinson* concluded that Section 3730(e)(4)(A)'s jurisdictional bar was triggered where previously disclosed information reflecting adversely on a defendant formed part of the basis for the *qui tam* action.

The conflict is plain from the foregoing straightforward readings of the Second and Third Circuits' decisions. Indeed, the broader reading by these courts of Section 3730(e)(4)(A)'s jurisdictional bar has been noted elsewhere. In *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509 (8th Cir. 1994), the Eighth Circuit reversed the district court's dismissal of relators' *qui tam* action because, following the D.C. Circuit's view in *Quinn*, it concluded that "the preclusive effect of section 3730(e)(4)(A) [applies] only when

'the critical elements of a fraudulent transaction themselves [are] in the public domain,'" and in the case before the court only information and not an allegation of fraud had been publicly disclosed. 40 F.3d at 1512 (quoting *Quinn*, 14 F.3d at 654); *see id.* at 1511-14. Judge Magill dissented from this decision by the Eighth Circuit. Although the focus of his dissent concerned the interpretation of the words "based upon" in the jurisdictional bar (as in "based upon the public disclosure of allegations or transactions"), Judge Magill noted without contradiction that, if the approach of several other courts were followed, the court would have to conclude that "allegations or transactions" within the meaning of Section 3730(e)(4)(A) had been disclosed in this case. In making this point, which the majority in *Rabushka* did not dispute, the dissent correctly characterized the Second Circuit as holding in *Kreindler* that "discovery materials indicating that [an] engineering change was made to [the] Black Hawk helicopter (*i.e.*, the false state of affairs) constituted public disclosure of allegations or transactions," 40 F.3d at 1525 n.13 (Magill, J., dissenting) (citing *Kreindler*, 985 F.2d at 1157-58), and the Third Circuit as holding in *Stinson* that "disclosure of [a] single memorandum describing allegedly fraudulent billing practice (but not its false or fraudulent nature) obtained through discovery in unrelated litigation constituted public disclosure of allegations or transactions," *id.* (Magill, J., dissenting) (citing *Stinson*, 944 F.2d at 1157).

Finally, it should be noted that the decisions in *Kreindler* and *Stinson* are not outliers in their own circuits. In fact, these decisions have been routinely invoked to justify the dismissal of *qui tam* actions because central information upon which the actions are based has been publicly disclosed prior to the action; this is true in both the Second[7] and the

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[7] *See, e.g.*, *United States ex rel. Phipps v. Comprehensive Cmty. Dev. Corp.*, 152 F. Supp. 2d 443, 453 (S.D.N.Y. 2001) (citing *Kreindler* for the proposition that "[t]he jurisdictional bar [of Section 3730(e)(4)(A)]

Third[8] Circuits. It is thus of no moment that these circuits have not explicitly stated that their approach differs from the

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applies if the qui tam action is based in any part on public information obtained through independent investigation" and on that basis dismissing action that was based on information disclosed during investigation); *United States ex rel. Pentagen Techs. Int'l Ltd. v. CACI Int'l Inc.*, 1997 U.S. Dist. LEXIS 12244 (S.D.N.Y. 1997) (dismissing relators' *qui tam* claims because, though not identical to allegations in previous lawsuit, they "could not have been constructed without the use of" information discovered in that previous suit); *United States ex rel. Gold v. Morrison-Knudsen Co.*, 870 F. Supp. 457, 459-60 (N.D.N.Y. 1994) (relying on *Kreindler* and dismissing Gold's *qui tam* action because it was based upon publicly disclosed information), *aff'd*, 68 F.3d 1475, 1477 (2d Cir. 1995) (noting that "Gold gleaned the information underlying Counts Two and Three from the media, from administrative reports prepared for the Army Corps, and from arbitration hearings concerning the cost overruns" and observing that "[t]he FCA bars *qui tam* suits based upon publicly disclosed information"); *see also United States ex rel. DeCarlo v. Kiewit/AFC Enters.*, 937 F. Supp. 1039, 1048 (S.D.N.Y. 1996) ("Since the Court finds that there is substantial overlap between the information forming the basis of the present *qui tam* action and the information obtained during the course of the *Mass Electric* litigation, the Court finds the basis of the suit to have been publicly disclosed within the meaning of section 3730(e)(4)(A).").

[8] *See, e.g., United States ex rel. Haskins v. Omega Inst.*, 11 F. Supp. 2d 555, 568 (D.N.J. 1998) (finding certain aspects of *qui tam* claims to be precluded by Section 3730(e)(4)(A) where "the evidence at bar tends to show that plaintiffs based their Complaint substantially on publicly available information" and, again, "because plaintiffs did not know—indeed, could not have known—essential elements of their FCA claim absent administrative reports" and thus "had to rely on publicly disclosed information in order to file their initial Complaint"); *United States ex rel. Atkin v. EEOC*, 1993 U.S. Dist. LEXIS 21268, at *17-19, *21 (D.N.J. 1993) (noting that in *Stinson* "the Third Circuit indicated that there is 'public disclosure' where *the information upon which the qui tam action is based* is potentially accessible to the public" and, on that basis, dismissing *qui tam* action, in part because allegations in complaint derived from information in a previous investigative report that had been publicly disclosed) (emphasis added). On the other hand, the Third Circuit in *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734 (3d

D.C. Circuit's in *Quinn*. This is not only to be expected, given that both the Second Circuit's *Kreindler* and the Third Circuit's *Stinson* were decided *before* the decision in *Quinn*. It also is irrelevant to the fundamental point: the federal courts of appeals take conflicting approaches to the nature of the information that they require to be in the public domain before they will conclude that a *qui tam* action based upon that information is based upon "allegations or transactions" within the meaning of Section 3730(e)(4)(A)'s jurisdictional bar—and therefore these courts reach conflicting results.[9]

Cir. 1997), emphasized that "the Act bars suits based on publicly disclosed 'allegations or transactions,' not information" and on that basis reversed dismissal of a *qui tam* suit where there had been no public allegation *of fraud*. *Id.* at 740-41. Petitioners here do not disagree with the quoted portion of the *Dunleavy* case—so long as it is agreed (as it is not) that the allegations necessary to trigger the jurisdictional bar need not be allegations *of fraud*, but rather can be assertions of wrongdoing or impropriety that do not comprise all of the elements of fraud. *Cf. supra* Part I. In any event, the salient point at the moment is that the *Dunleavy* case indicates that there are two competing lines of authority in the Third Circuit, one invoked by some district courts to justify dismissal and the other by other district courts to justify refusals to dismiss. Just as there is no basis for varying treatment in district courts in different circuits across the Nation, so, too, *a fortiori*, is there no principled basis for inconsistent treatment of *qui tam* claims within the same circuit.

[9] Although the conflict is most stark with respect to the Second and Third Circuits, that is not its extent. The Tenth Circuit also took a different approach from the D.C. Circuit in *United States ex rel. Fine v. Sandia Corp.*, 70 F.3d 568 (10th Cir. 1995). Fine brought a *qui tam* action against Sandia, which operates one of nine multi-program national laboratories owned by the United States and operated by private or university contractors under the Department of Energy's ("DOE's") administrative oversight, for misappropriating nuclear waste funds in violation of federal law. *See id.* at 569. A General Accounting Office report and a congressional hearing discussed this general practice by the national laboratories but did not mention Sandia specifically. *See id.* at 569-70. The court held that the jurisdictional bar was triggered, reasoning as follows: "Because these disclosures detailed the mechanics of the

At the end of the day, there is a deep, intractable, and important conflict in the courts of appeals. Its effect is that *qui tam* actions such as the instant one, which are based upon information that has previously been disclosed to the public, go forward in some parts of the Nation, even while they would be barred in other parts. Whichever approach is correct (and thus regardless of petitioners' view set forth in Part I above that it is not the Ninth Circuit's), the disparity in treatment has no principled basis. The need for review of the question presented here is thus clear, as will often be the case whenever the existence of federal jurisdiction over a large class of cases is in doubt.

III. THE APPROACH OF THE D.C. CIRCUIT IN *QUINN* AND THE NINTH CIRCUIT HERE FAILS TO GIVE EFFECT TO WHAT EVEN THESE COURTS CONCEDE IS CONGRESS'S INTENT IN SECTION 3730(e)(4)(A) TO PRECLUDE *QUI TAM* ACTIONS WHERE RELATORS ADD NO SUBSTANTIVE INFORMATION OF WRONGDOING.

The foregoing sections establish (i) that the D.C. Circuit in *Quinn* (along with the Ninth Circuit here and the Eighth Circuit) has given Congress's jurisdictional bar in Section

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practice, revealed that at least two of Sandia's eight sister laboratories were engaged in it, and indicated the DOE's acquiescence, we conclude that they sufficiently alerted the government to the likelihood that Sandia would also 'tax' nuclear waste funds in the future." *Id.* at 571. "In other words," as the Ninth Circuit would subsequently characterize the Tenth Circuit's reasoning, "the prior public disclosures contained enough information to enable the government to pursue an investigation against Sandia," and that was sufficient to trigger Section 3730(e)(4)(A)'s jurisdictional bar. *United States v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1019 (9th Cir. 1999). *See also infra* pp. 27-29 (demonstrating through discussion of *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326 (6th Cir. 1998), that, though having formally endorsed the *Quinn* "X + Y = Z" test, the Sixth Circuit, too, has conflicted with it).

3730(e)(4)(A) an interpretation that has heightened its requirements (and thus lowered the threshold for jurisdiction), contrary to the ordinary and common-sense meaning of its key term "allegations," and (ii) that in so doing, these courts have deviated from the interpretation of Section 3730(e)(4)(A) established by the Second and Third Circuits (as well as the Sixth and the Tenth), with the result that cases (such as the instant one) that would be barred in any of this latter group of circuits are permitted in any of the former. More than this is scarcely required to justify this Court's review, especially given that the disputed question concerns an interpretation of a jurisdictional statute (or, indeed, an anti-jurisdictional statute). But in fact there is more. In cases such as this, the *Quinn* approach fails under even its own terms: it permits a *qui tam* action where a relator adds no substantive information of wrongdoing.

As *Quinn* at least nominally appreciated, Congress sought in the False Claims Act "to walk a fine line between encouraging whistle-blowing and discouraging opportunistic behavior." 14 F.3d at 651. The D.C. Circuit in *Quinn* thus stated, quoting *Stinson*, that Section 3730(e)(4)(A) was intended to ensure that a *qui tam* relator "'possess[ed] substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation.'" *Id.* at 655 (quoting *Stinson*, 944 F.2d at 1160). This proposition is recognized, at least in the abstract, by all federal courts, under a variety of different formulations: for example, the D.C. Circuit itself has stated that under Section 3730(e)(4)(A) "[a] relator's ability to recognize the legal consequences of a publicly disclosed fraudulent transaction does not alter the fact that the material elements of the violation already have been publicly disclosed." *United States ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 688 (D.C. Cir. 1997).

Cases such as this, however, are examples of such opportunistic behavior that is nonetheless permitted under the rule of decision in *Quinn*. Relators have added no "substantive information about [some] particular fraud" on the part of petitioners. *Compare Quinn*, 14 F.3d at 655 (quoting *Stinson*, 944 F.2d at 1160). Relators have brought to the table, at most, "background information which enables [them]," *compare id.* (quoting same), given their knowledge of federal Medicaid/Medicare reimbursement schemes, to take publicly disclosed information—the HCFA audits or surveys that are required by federal law to be available at state offices and indeed to be posted at care facilities—and to allege (assuming that petitioners have submitted reimbursement requests for some of the same care deemed by the HCFA audits or surveys to be substandard) that petitioners in making their reimbursement requests have sought to defraud the federal government. Relators have thus sought to take information in the public domain (information adverse to petitioners) that was as available to others as it was to them and, on the basis of that information and their background knowledge, to allege fraud. *As measured by* Quinn*'s own recounting of Congress's purposes in Section 3730(e)(4)(A)*, the *qui tam* statute was not intended to permit this type of action. Yet the simplistic "X + Y = Z" rule of decision that the Ninth Circuit here adopted from *Quinn* permits this action. Petitioners submit that something is wrong with constant application of a test that not only departs from the language of the statute (by requiring that the "allegations" be "allegations *of fraud*"), *see supra* Part I, but also permits actions that the rationale said to underlie the test indicates should be barred, as established in this Part.

This is not merely petitioners' intuition. Surely it is telling that in one case where the policies underlying the *qui tam* statute would not have been served by permitting a *qui tam* action to go forward, but the "X + Y = Z" test would have so permitted, a court of appeals that indicated that it would otherwise follow this approach from *Quinn* simply refused to

apply it. In *United States ex rel. Jones v. Horizon Healthcare Corp.*, 160 F.3d 326 (6th Cir. 1998), relator argued that a previous administrative complaint that she had filed was not a prior public disclosure of the "allegations or transactions" in the *qui tam* suit because only the "Y" and not the "X" had been asserted there—i.e., she contended that the previous complaint "disclosed only the true state of facts and not the misrepresented state of facts." *Id.* at 331. The court of appeals (a) generally endorsed the *Quinn* "X + Y = Z" formulation, (b) did not disagree with relator's assertion that her previous disclosure had not alleged both X and Y, and (c) further was not persuaded by the *qui tam* defendant's response that the previous disclosure had alleged Z (i.e., had made an outright allegation of fraud). *See id.* at 331-32. Yet the court nonetheless held the relator's action barred by Section 3730(e)(4)(A). The Sixth Circuit explained that "although [relator's previous administrative] complaint may not have constituted an explicit, formal allegation of either fraud [i.e., Z] or the essential elements of fraud [i.e., X + Y], *it certainly presented enough facts to create an inference of wrongdoing on the part of [the* qui tam *defendant]*." *Id.* at 332 (emphasis added). The Sixth Circuit explained that "this case is [thus] distinguishable from the ones [relator] relies on in which the disclosed information did not suggest an inference of wrongdoing or bad faith," such as *Quinn*, where the court held that "disclosure of facially valid pay vouchers would not defeat jurisdiction where the records did not suggest any misrepresentation on the defendant's part in submitting them," *id.* (citing 14 F.3d at 656), and *Dunleavy*, where, again, the disclosed fact was on its face innocuous, *id.* (citing 123 F.3d at 742). *Compare United States v. A.D. Roe Co.*, 186 F.3d 717, 724 (6th Cir. 1999) (following *Quinn* and stating that "X + Y = Z" test must be satisfied to trigger Section 3730(e)(4)(A)'s jurisdictional bar).

As demonstrated above in Part I, petitioners here want nothing more than what the *qui tam* defendants received from

the Sixth Circuit in *Jones*—an interpretation of Section 3730(e)(4)(A) that is sensitive and faithful to the provision's purpose of barring *qui tam* actions where a relator brings no "'substantive information about the particular fraud, [but] merely background information which enables [the] relator to understand the significance of a publicly disclosed transaction or allegation.'" *Quinn*, 14 F.3d at 655 (quoting *Stinson*, 944 F.2d at 1160). That is what *Quinn* sought to provide, but mechanical application of its "X + Y = Z" formulation by courts such as the Ninth Circuit has been insensitive and unfaithful to this purpose, causing cases such as this to go forward, even though they are based upon public allegations of wrongdoing or impropriety on a defendant's part.[10] Other courts, such as the Third Circuit, *see supra* pp. 20-21, 23-24 n.8 (discussing *Stinson* and *Dunleavy*), and the Sixth Circuit, *see supra* pp. 27-28 (discussing *Jones* and *A.D. Roe Co.*), have attempted to be more sensitive and faithful to this purpose, but in doing so have both departed from courts such as the D.C. Circuit and the Ninth Circuit and prompted unacknowledged intracircuit conflicts.

In short, it is true that *Quinn* avoided an overly broad jurisdictional bar—i.e., an interpretation of Section 3730(e)(4)(A) that would bar jurisdiction wherever *any*

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[10] It may be that the D.C. Circuit's "X + Y = Z" formulation is best conceived of as analogous to this Court's statement with respect to federal-question jurisdiction that "[a] suit arises under the law that creates the cause of action." *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916) (Holmes, J.). Of this it has been famously remarked that "[i]t has come to be realized that Mr. Justice Holmes' formula is more useful for inclusion than for the exclusion for which it was intended." *T.B. Harms Co. v. Eliscu*, 339 F.2d 823, 827 (2d Cir. 1964) (Friendly, J.). The analogy is that a case where the "X + Y = Z" formulation is satisfied (i.e., where there is either both X and Y or Z) clearly is included within the jurisdictional bar; that does not establish, however, that no other cases come within Section 3730(e)(4)(A), and the Ninth Circuit was thus wrong to apply the formula as a rule of exclusion.

information, however innocuous, related to the fraud had been disclosed. But in avoiding this rock, the case—at least as it has been interpreted and employed by courts such as the Ninth Circuit here—has opened up a whirlpool of excessive federal jurisdiction, beyond Congress's intent. Only this Court can provide a principled interpretation of Section 3730(e)(4)(A) that can be applied consistently both across the Nation and within individual circuits. There is no substantial basis for the disparate treatment afforded different *qui tam* cases with respect to application of Section 3730(e)(4)(A).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 99-17539
D.C. No. CV-97-548 LKK

UNITED STATES OF AMERICA *ex rel.*
FOUNDATION AIDING THE ELDERLY; MARSHA J. BAKER,
Plaintiffs-Appellants,

v.

HORIZON WEST INC., a California Corporation; HERITAGE CONVALESCENT HOSPITAL; EMPRESS CONVALESCENT HOSPITAL; EMERALD DISTRIBUTING COMPANY, INC.; FAR WEST INC., a California Corporation; LINWOOD GARDENS CONVALESCENT HOSPITAL, INC., a California Corporation; MID-VALE CONVALESCENT HOSPITAL, INC.; SACRAMENTO CONVALESCENT HOSPITAL, INC., a California Corporation; SOUTH GATE CARE CENTER INC., a California Corporation; VALLEJO CONVALESCENT HOSPITAL, INC.; WESTGATE GARDENS CONVALESCENT CENTER, INC.; MONTEREY BAY CONVALESCENT HOSPITAL, INC.; SIERRA MEDICAL ENTERPRISES INC. SIERRA MEDICAL ENTERPRISE, INC. dba Grass Valley Convalescent Hospital; EL DORADO CONVALESCENT HOSPITAL INC.; FOOTHILL OAKS CARE CENTER INC.; HILLTOP MANOR CONVALESCENT HOSPITAL INC., LAKEPORT SKILLED NURSING CENTER INC.; LINCOLN MANOR INC.; LIVE OAK MANOR INC.; MEADOW VIEW MANOR INC.; MONTEREY PINES SKILLED NURSING FACILITY INC.; NAPA NURSING CENTER INC.; PLACERVILLE PIES [*sic*] CONVALESCENT HOSPITAL INC.; ROSEVILLE CONVALESCENT HOSPITAL INC.; SIERRA HILLS CARE CENTER INC.; SUNNY HILLS CONVALESCENT HOSPITAL INC.; VALLEY VIEW

SKILLED NURSING FACILITY INC.; WALNUT WHITNEY CONVALESCENT HOSPITAL INC.; SIERRA SOLANO CARE CENTER INC.; WESTCARE MANAGEMENT INC.; FOUR CORNERS REGIONAL CARE CENTER INC.; PARKDALE CARE CENTER INC.; RED CLIFFS REGIONAL INC.; HORIZON WEST INC.; PACIFIC WEST PHARMACY INC., a California Corporation; ELLEN L. KUYKENDALL; BERNICE SCHRABECK; MICHAEL MCDONALD; MILTON HARMON; AUBURN MANOR INC., dba Golden Empire Convalescent Hospital dba Parkview Nursing Center; MEDICREST OF CALIFORNIA INC., dba Medical Center Convalescent Hospital; MEDICREST OF CALIFORNIA 1 INC., dba Arlington Gardens Convalescent Hospital dba Montclair Manor Convalescent Hospital; WHITEHALL CONVALESCENT HOSPITAL INC., dba Wellesley Manor Convalescent Hospital; SIERRA HEALTH CARE MANAGEMENT CORPORATION dba Sierra Health Care Convalescent Hospital; SANDY REGIONAL INC., Sandy Regional Convalescent and Rehabilitaion [*sic*] Center,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
April 11, 2001—San Francisco, California
Filed, September 13, 2001
[Stamped "Entered Sep 18 2001 Calendared"]
[As Amended by December 21, 2001 Order, see *infra* Appendix D]

Before: STEPHEN REINHARDT, A. WALLACE TASHIMA, AND MARSHA S. BERZON, *Circuit Judges*.

Opinion by Judge Tashima.

TASHIMA, Circuit Judge:

I.

Appellants filed this qui tam action alleging that Appellees defrauded the United States by receiving payments from Medicare and Medicaid for care which was not given. The district court dismissed the action because it held that 31 U.S.C. § 3730(e)(4)(A)'s public disclosure bar deprived it of jurisdiction. We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291.[1] We review the district court's findings of fact relevant to its determination of subject matter jurisdiction for clear error. *See United States ex rel. Biddle v. Bd. of Trs. of Leland Stanford, Jr. Univ.*, 161 F.3d 516, 520 (9th Cir. 1999). Whether a particular disclosure triggers the jurisdictional bar of § 3730(e)(4)(A), however, is a mixed question of law and fact that we review de novo. *See United States ex rel. Lindenthal v. Gen. Dynamics Corp.*, 61 F.3d 1402, 1409 n.9 (9th Cir. 1995).

II.

The False Claims Act ("FCA") deprives a district court of jurisdiction over any *qui tam* action that is based on allegations or transactions already disclosed in certain public fora, unless the relator is the original source of the

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[1] Appellees contend that we lack jurisdiction over this appeal because Appellants failed to amend their notice of appeal after the district court issued its final written order. Fed. R. App. P. 4(a)(2) provides, however, that if a "notice of appeal [is] filed after the court announces a decision or order—but before the entry of the judgment or order—[it] is treated as filed on the date of the entry." Thus, Appellants' notice of appeal, which was filed after the district court orally announced its decision on November 11, 1999, but before it issued its written order, became effective on January 6, 2000—the date of the entry of the order, and we do not lack jurisdiction over this appeal.

information underlying the action. *A-1 Ambulance Serv., Inc. v. California*, 202 F.3d 1238, 1243 (9th Cir. 2000).[2] In analyzing whether a claim is barred under the FCA, we must first determine whether there has been a prior "public disclosure" of the "allegations or transactions" underlying the *qui tam* suit. *See id.* (citing *United States ex rel. Harshman v. Alcan Elec. & Eng'g, Inc.*, 197 F.3d 1014, 1018 (9th Cir. 1999)). "If and only if there has been such a public disclosure," we then inquire into whether the relator is an "original source" within the meaning of § 3730(e)(4)(B). *Id.*

The question of whether the "allegations or transactions" underlying the relators' fraud claims have been publicly disclosed, in turn, requires that we make two separate but related determinations. *See A-1 Ambulance Serv.*, 202 F.3d at 1243. First, we "must decide whether the public disclosure originated in one of the sources enumerated in the statute." *Id.* Public disclosure can occur in one of only three categories of public fora: (1) in a "criminal, civil, or administrative hearing;" (2) in a "congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation;" or (3) in the "news media." *Id.* (quoting 31 U.S.C. § 3730(e)(4)(A)).

If there has been a public disclosure through one of these sources, we then determine whether the content of the disclosure consisted of the "allegations or transactions" giving rise to the relators' claim, as opposed to "mere

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[2] The relevant section of the FCA provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A).

information." *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1473 (9th Cir. 1996). The substance of the disclosure, however, need not contain an explicit "allegation" of fraud, so long as the material elements of the allegedly fraudulent "transaction" are disclosed in the public domain. *See id.* (citing *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (D. C. Cir. 1994)).

A.

The first issue tendered for decision is whether the publicly-disclosed surveys at issue qualify as public disclosures as defined in the statute.[3] Appellants argue that the surveys do not qualify as public disclosures because they are not "audits," "reports," or "investigations" within the meaning of § 3730(e)(4)(A)'s second category of public fora.[4] Appellees contend that the surveys do so qualify and

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[3] Appellants challenge only whether the surveys qualify as public disclosures, not whether the other publicly-disclosed information offered by Appellees, such as the civil lawsuits filed in two separate courts, the newspaper article, and the various public hearings, so qualify under § 3730(e)(4)(A).

[4] In order to participate in either Medicare or Medicaid, skilled nursing facilities must permit the surveys at issue and the inspections on which they are based. 42 U.S.C. § 1395i-3(g)(2)(A)(i) (providing that to be eligible to receive Medicare and Medicaid, all skilled nursing facilities "shall be subject to a standard survey, to be conducted without any prior notice to the facility."). The purpose of these surveys is to "assess whether the quality of care, as intended by the law and regulations, and as needed by the resident, is actually being provided in nursing homes." 42 C.F.R. § 488.110. These surveys, *inter alia*, (1) report on the quality of care; (2) review the facilities' written plans of care and, through residents' assessments, determine the adequacy of such plans of care; and (3) review compliance with residents' rights. 42 U.S.C. § 1395i-3(g)(2)(A)(ii); 42 C.F.R. § 488.1-488.456. To insure consistent reporting, the interpreting regulations provide for the surveys' (1) form, *see* 42 C.F.R. § 488.115; (2) content, *see id.* § 488.110, and (3) frequency, *see id.* § 488.308.

further argue that the surveys also qualify as public disclosures falling within § 3730(e)(4)(A)'s first category of public fora—namely, as "criminal, civil, or administrative hearings."

We need not answer that question today, however. That is so because, even assuming that the surveys do qualify as public disclosures, this action is still not barred because none of the disclosures in the surveys or any of the other disclosures reveal either the allegations or transactions at issue in this case.

B.

Even assuming that a disclosure qualifies as a "public disclosure" under § 3730(e)(4)(A), in order for the jurisdictional bar to apply, that disclosure must reveal the "allegations or transactions" underlying Appellants' complaint. *See Hagood*, 81 F.3d at 1473. In analyzing whether *allegations* of fraud were previously disclosed, we must determine whether there was a public disclosure of fraud which was "substantially similar to those disclosed in the earlier . . . action." *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1033 (9th Cir. 1998). In analyzing whether the *transactions* underlying a relator's complaint were publicly disclosed, however, we adopt the analysis first laid out by the District of Columbia Circuit in *Spingfield [*sic*] Terminal*:

> [I]f X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed.

14 F.3d at 654. In so doing, we also adopt the District of Columbia Circuit's reasoning that in a fraud case, X and Y inevitably stand for but two elements: "a misrepresented state of facts and a true state of facts." *Id.* at 655.

C.

Several documents purportedly publicly disclosed allegations of fraud against at least some Appellees, including the parent company of all of the other Appellees, Horizon West, Inc. For example, a complaint filed in the Yolo County Superior Court raises general allegations of fraud against some of the Appellees. In the body of the complaint, however, the plaintiffs only alleged that the defendants generally misrepresented to them the level of care provided by the particular nursing facility. While these allegations may disclose some fraud on the part of the defendants, they only remotely support the claims at issue. Indeed, at most, these allegations only disclose the true set of facts, *viz.*, that the facility in question provided substandard care. What is conspicuously missing from that complaint are any allegations that the named defendants misrepresented the level of care to the government and received payment for that alleged substandard care.

Also, a complaint filed in the Solano County Superior Court against Horizon West, Inc., Vallejo Convalescent Hospital Inc., and Ellen Kuykendall (among others) generally alleged that these defendants "fraudulently conceal[ed] from [residents, employees, physicians, governmental officials who inspect or have other business in the facility, family members, friends, suppliers of goods and services, volunteers and other persons who frequent the facility] the improper, deficient care of residents and the hazardous health conditions alleged herein." But, the complaint addressed a very different problem—asbestos contamination—than the one alleged here. Thus, the allegations contained therein completely failed to disclose anything remotely similar to the fraud alleged here.[5]

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[5] Appellees also present a Sacramento Bee article which reported that Foothill Oaks Care Center received a citation, and a fine, for a premature entry on a patient's chart. They argue that this article publicly disclosed a

Consequently, these unrelated allegations of fraud cannot trigger § 3730(e)(4)(A)'s jurisdictional bar. Although "fraud" may have been generally alleged against some of the current Appellees in certain contexts, none of the evidence in the record "fairly characterizes" the kind of fraud alleged by Appellants here. To put it somewhat differently, "it is [im]possible to say that the evidence and information in the possession of the United States at the time the False Claims Act suit was brought was sufficient to enable it adequately to investigate the case and to make a decision whether to prosecute." *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1377 (D.C. Cir. 1981) (quoting *Pettis ex rel. United States v. Morrison-Knudsen Co.*, 577 F.2d 668, 674 (9th Cir. 1978)). Therefore, we conclude that this action is not barred by the previous disclosure of the fraud at issue.

D.

Even if the above *allegations* did not specifically identify the fraud at issue, the action may still be barred if some disclosures revealed the *transactions* underlying the fraud.

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fraudulent transaction and thus bars the instant suit. Once again, however, we do not believe that this report would give the government sufficient information to initiate an investigation against this facility. *See Alcan Elec. and Eng'g, Inc.*, 197 F.3d at 1019. While the premature entry in the patient's medical chart may be a technical violation of the appropriate regulations, and thus subjected the facility to a penalty, it sheds little light on the current allegations—namely, that payments were sought for care not given. Indeed, nothing in the article indicates that the care which is the subject of the premature entry was not given, or that it was paid for. Thus, we decline to hold that the jurisdictional bar applies to that Appellee.

Appellees also point to general allegations of fraud that were directed at the nursing home industry in general. But, as pointed out by Appellants, none of these "disclosures" related to Horizon West or specifically to any of its facilities. Therefore, they do not trigger the jurisdictional bar. *See Cooper v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 566 (11th Cir. 1994) ("The allegations of widespread . . . fraud made in sources in which BCBSF was not specifically named or otherwise directly identified are insufficient to trigger the jurisdictional bar").

On this record, however, we are unable to so conclude. The primary source which could potentially reveal the underlying fraudulent transactions are the surveys.[6] In order to do so, the surveys must disclose both "a misrepresented state of facts and a true state of facts." We do not dispute Appellees' assertion that at least the true state of fact has been disclosed by the surveys—namely, that the defendant provided sub-standard care. But we cannot conclude from the surveys alone that the misrepresented state of fact has also been disclosed. This is especially important because the FCA speaks of "transactions." Thus, in order to invoke the jurisdictional bar, a defendant must show "that the transaction . . . be one in which a set of misrepresented facts has been submitted to the government." *United States ex rel. Dunleavy v. County of Del.*, 123 F.3d 734, 741 (3d Cir. 1997) (footnote omitted); *accord United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1420 (9th Cir. 1992) ("The requisite intent is the knowing presentation of what is known to be false" which is "something less than that set out in the common law."). They have not done so here.

III.

Accordingly, we conclude that the evidence disclosed failed to expose either the fraud alleged or the transactions underlying that fraud. Consequently, the district court's dismissal of the action as barred by a "public disclosure" is reversed and the case is remanded for further proceedings consistent with this opinion.[7]

REVERSED AND REMANDED.

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[6] The Second Amended Complaint specifically alleges instances of substandard care against 17 defendants. The great majority of these specific allegations are taken from the surveys; a few of the specific allegations are based on observations by private individuals. As to all the other defendants, Appellants only generally allege that they have committed acts "similar to other Horizon facilities."

[7] We also deny Appellees' motion to strike.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.* FOUNDATION AIDING THE ELDERLY, a California Non-Profit corporation; and MARSHA J. BAKER,

Plaintiffs,

v.

HORIZON WEST INC., a California corporation; AUBURN MANOR, INC., a California corporation, *et al.*,

Defendants.

[Stamped "Filed Aug 20, 1999
Clerk, U.S. District Court
Eastern District of California
By Deputy Clerk" and
"Entered Aug 26 1999 Calendared"]

ORDER

I.

PROCEDURAL HISTORY

Relators Foundation Aiding the Elderly ("FATE"), a California non-profit corporation, and Marsha Baker filed this qui tam suit under the False Claims Act ("FCA or "the Act"), alleging that defendant Horizon West, Inc. and the corporate owners of thirty-nine other skilled nursing facilities engaged in a pattern and practice of falsifying medical records to conceal inadequate medical care. Relators allege that the staff at defendants' facilities delivered substandard care to many resident Medicare and Medicaid patients,[1] and deliberately

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[1] Federal law provides that skilled nursing facilities as a precondition for receiving federal funds such as Medicare and Medicaid, must comply

falsified documentation of the level of care in the activities of daily living ("ADLs") which are supposed to substantiate the billing for federal funds under Medicare and Medicaid.

Subject to the parties' stipulation, the court bifurcated the litigation in this case. The scheduling order provided that the court would adjudicate the propriety of subject matter jurisdiction first, and therefore directed that during the initial phase the parties were to conduct all discovery necessary to fully resolve the jurisdictional issue. Accordingly, defendants noticed the instant motion challenging this court's jurisdiction over the relators' claims.[2]

II.

STANDARDS FOR DISMISSAL UNDER FED. R. CIV. P. 12(b)(1)

It is well established that the party seeking to invoke the jurisdiction of the federal court has the burden of establishing that jurisdiction exists. *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 278 (1936); *Scott v. Breeland*, 792 F.2d 925, 927 (9th Cir. 1986). On a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1), the standards that must be applied vary according to the nature of the jurisdictional challenge.

If the challenge to jurisdiction is a facial attack, *i.e.*, the defendant contends that the allegations of jurisdiction contained in the complaint are insufficient on their face to

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with federal, state and local operating laws and professional standards. *See* 42 U.S.C. § 1395i-3 (Medicare), 42 U.S.C. § 1396r (Medicaid), and 42 C.F.R. part 483. Standards of care are also codified in the Omnibus Budget Reconciliation Act (OBRA) of 1987, § 1861(j) of the Social Security Act. *See* 42 U.S.C. § 1395i-3 (Medicare), 42 U.S.C. § 1396r (Medicaid), and 42 C.F.R. part 483.

[2] In actuality, defendants noticed forty separate motions for dismissal—one brought by each individual defendant—in addition to a joint motion addressing all similar legal and factual issues. The relators oppose all forty-one motions with one joint motion.

demonstrate the existence of jurisdiction, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12(b)(6) motion is made. The factual allegations of the complaint are presumed to be true, and the motion is granted only if the plaintiff fails to allege an element necessary for subject matter jurisdiction. *See* 2A J. Moore, J. Lucas & G. Grotheer, *Moore's Federal Practice* para. 12.07[2.-1], at 12-46 to 12-47 (2d ed. 1987). *See also Eaton v. Dorchester Development, Inc.*, 692 F.2d 727, 731 (11th Cir. 1982); *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. 1981), *cert. den.*, 454 U.S. 897 (1981); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A complaint will be dismissed for lack of subject matter jurisdiction (1) if the case does not "arise under" any federal law or the United States Constitution, (2) if there is no case or controversy within the meaning of that constitutional term, or (3) if the cause is not one described by any jurisdictional statute. *Baker v. Carr*, 369 U.S. 186, 198 (1962).

If the challenge to jurisdiction is made as a "speaking motion" attacking the truth of the jurisdictional facts alleged by the plaintiff, a different set of standards must be applied. *Thornhill Pub. Co., Inc. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). Where the jurisdictional issue is separable from the merits of the case, the district court is free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary. *Augustine v. United States*, 704 F.2d 1074, 1077 (9th Cir. 1983); *Thornhill*, 594 F.2d at 733. "In such circumstances '[n]o presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims.'" *Augustine*, 704 F.2d at 1077 (quoting *Thornhill*, 594 F.2d at 733).

> However, where the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to

> the merits, the jurisdictional determination should await a determination of the relevant facts on either a motion going to the merits or at trial.

Augustine, 704 F.2d at 1077 (citing *Thornhill*, 594 F.2d at 733-35; 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1350, at 558 (1969 & Supp. 1987)). On a motion going to the merits, the court must, of course, employ the standard applicable to a motion for summary judgment. *Farr v. United States*, 990 F.2d 451, 454 n.1 (9th Cir. 1993), *cert. denied*, 510 U.S. 1023 (1993).

III.

PROCEDURAL RULINGS

Defendants move pursuant to Fed. R. Civ. P. 12(b)(1), contending that the relators cannot surmount the public disclosure limitation in the False Claims Act. *See* 31 U.S.C. § 3730(e)(4)(A)-(B). Before addressing the substantive inquiry, I turn first to three procedural issues raised in the relators' opposition.

A. FACIAL ATTACK v. SPEAKING MOTION

First, relators oppose this motion largely assuming that the jurisdictional allegations in the complaint suffice to rebut defendants' jurisdictional evidence to the contrary. However, defendants do more than argue that the complaint lacks allegations to support jurisdiction. Defendants challenge the relators' ability to adduce facts supporting jurisdiction at the time the complaint was filed. *See Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). On such a speaking motion attacking jurisdictional facts, "[n]o presumptive truthfulness attaches to plaintiff's allegations . . . ." *See Augustine*, 704 F.2d at 1077; *see also* 3 *Moore's Federal Practice*, § 12.30[4] (3d ed., 1998 Supp.). Rather, the court must look to and weigh the facts as adduced by the plaintiff in support of its assertion of subject matter jurisdiction. *Id.*; *see also KVOS,*

Inc. v. Associated Press, 299 U.S. at 278, and *Scott v. Breeland*, 792 F.2d at 927. Here, aside from four declarations from percipient witnesses and a portion of relator Marsha Baker's deposition attesting to poor care at several facilities, the relators offer no further evidence in opposition to this motion despite their burden to come forward with jurisdictional facts.

B. RELATOR'S REQUEST FOR ADDITIONAL DISCOVERY

Second, as mentioned above, the parties stipulated to a bifurcated litigation and discovery plan. Because under the False Claims Act this court's jurisdiction turns, *inter alia*, upon whether the information alleged by the relator has been "publicly disclosed," and if so whether the relator was nonetheless the "original source," *see* 31 U.S.C. § 3730(e)(4)(A), the parties agreed to sever the litigation to avoid extensive discovery on the merits should jurisdiction be lacking. The parties were thus afforded adequate opportunity to conduct any and all discovery as to the subject matter jurisdiction issue—and only that issue—to be followed by the adjudication of this 12(b)(1) motion.

Despite this, relators argue that, in the event the court finds their reliance on their allegations and minimal evidence insufficient, they should be afforded additional time to conduct discovery going to the jurisdictional facts. However, this request contravenes both the scheduling order,[3] and the Stipulated Discovery Plan, in which the relators agreed that

> "defendants' planned Motion to Dismiss cannot be based upon what was known to the Relators' counsel, as this is

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[3] The scheduling order provides that:

> "[a]ll discovery is left open, save and except that it shall be so conducted as to permit a motion directed to the subject matter jurisdiction (public source) issue to be completed by March 31, 1999."

See Order filed January 19, 1999 at 4:10-13.

> not the relevant inquiry. Rather, the inquiry is what was known to the Relator personally and whether the Complaint is based upon public disclosures within the meaning of 31 U.S.C. § 3730(e)(4)(A). The Motion to Dismiss will thus be properly based *only* upon (1) what the Relators have testified to knowing in their depositions, when examined by the defendants; (2) the scope of any public disclosures which are, by their nature, already public; and (3) the Complaint, which determines what this action is 'based upon.'"

See Stipulation Regarding Discovery Dispute at 14.

Although a plaintiff generally should be afforded additional time to complete discovery to fend off an early jurisdictional attack, *see* Fed. R. Civ. P. 12(b), here the relators agreed that the discovery deadline of March 31, 1999 would be sufficient to conduct all necessary discovery relevant to subject matter jurisdiction. Moreover, in light of relators' acknowledgment that the jurisdictional facts are limited to what the relators knew at the time they filed their complaint, it would appear futile to allow them to conduct discovery of facts which are not already in their possession.

Just as dismissal is appropriate under Fed. R. Civ. P. 12(b)(6) where "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), this standard "is equally applicable in motions challenging subject matter jurisdiction when such jurisdiction may be contingent upon factual matters in dispute." *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987). Thus, if the jurisdictional facts already adduced by relators fail to withstand this motion, then dismissal will be appropriate without further discovery. In sum, relators' request for additional discovery going to jurisdiction must be denied.

C. RELATORS' REQUEST FOR LEAVE TO AMEND

Lastly, relators ask that they be given leave to amend their complaint if the court finds their allegations insufficient. As I have stated, the sufficiency of the allegations is irrelevant under the standards for a speaking motion. The issue before the court on this motion is whether relators can adduce evidence to dispute the jurisdictional attack. Accordingly, relators' request for leave to amend will be denied as moot.

IV.

JURISDICTION UNDER THE FALSE CLAIMS ACT

A. "PUBLIC DISCLOSURE"

Defendants' attack on the court's subject matter jurisdiction over relators' claim is premised on the public disclosure provision in the FCA. 31 U.S.C. § 3730(e)(4)(A)-(B).[4] Under that statute, this court lacks jurisdiction over allegations based upon prior public disclosures of the same information, unless the relator can establish that she is the original source of the publication.[5] *See United States ex rel.*

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[4] The Act provides:

> "(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

31 U.S.C. § 3730(e)(4)(A)-(B).

[5] The public disclosure provision is designed to avoid "parasitic" suits in which relators attempt to benefit from information already in the

Hagood v. Sonoma County Water Agency ("Hagood I"), 929 F.2d 1416, 1419-20 (9th Cir. 1991).

Under § 3730(e)(4)(A) a district court lacks jurisdiction when: (1) there has been a "public disclosure" (2) of "allegations or transactions" (3) in a "criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media" and (4) the relator's action is "based upon" that public disclosure. *United States ex rel. Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1409 (9th Cir. 1995). The statute's jurisdictional bar is triggered when it is established that there has been a public disclosure of the information contained in relators' allegations.[6] *Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir. 1992).

Here, defendants support their jurisdictional challenge with copies of numerous reports completed by the California Department of Health Services ("DHS") reviewing certain aspects of the management practices and delivery of patient care at defendants' facilities,[7] other public reports involving the hospitals, news accounts, and the deposition testimony of the relators.[8] Defendants contend that even if relators' allegations of fraud and falsification of records are true, the

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possession of the government. John T. Boese, *Civil False Claims and Qui Tam Actions*, at 4-32 (1998 Supplement).

[6] Where there has been no public disclosure, there is no need to inquire whether relators were the original source of the allegations of fraud. *United States ex rel Hagood v. Sonoma County Water Agency ("Hagood I")*, 929 F.2d 1416, 1419-20 (9th Cir. 1991).

[7] The court takes judicial notice of the surveys. *Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994) (records and reports of administrative agencies are judicially noticeable).

[8] The deponents include Marsha Baker, an individual who volunteered briefly in one of defendants' facilities, and Carol Herman, president of Foundation Aiding the Elderly ("FATE").

information upon which relators based the complaint was previously publicly disclosed by the contents of the state surveys and other reports.[9] Defendants argue that relators cannot dispute that there was no public disclosure prior to the filing of this complaint, because they cannot show that their allegations of falsification are "based upon" anything other than the previous public disclosures, and they cannot refute that they were not the "original source" of the public disclosures.

i. *Administrative Reports*

Relators argue that the state surveys proffered by defendants cannot be deemed public disclosures, because they have not been "actually disclosed," and because state documents are not encompassed by the False Claims Act.

a. *Actual Disclosure*

Courts hold varying views about whether it is necessary for the information to actually have been publicly disclosed, or whether being "potentially accessible" to the public suffices under the Act.[10] The Ninth Circuit has not squarely decided

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[9] Defendants do not concede that they committed fraud. Rather, they argue that, to the extent the relators' allegations of fraud are based upon speculation or inferences drawn from certain facts, those facts are no different from the information already publicly disclosed.

[10] *See, e.g., United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3rd Cir. 1991) (information revealed in discovery in a state civil proceeding without any protective order was a matter of public record, and thus "publicly disclosed" regardless of whether anyone other than the parties to the litigation had actually viewed it); *cf. United States ex rel. Stinson, Lyons Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield, Inc.*, 755 F. Supp. 1040 (S.D. Ga. 1990) (since information received through traditional discovery requests has not been "disclosed" via a civil hearing, a qui tam suit based on such information would not be barred).

this issue.[11] In *United States ex rel. Schumer v. Hughes Aircraft*, the Ninth Circuit held that information that was only potentially available to the public pursuant to the Freedom of Information Act was not publicly disclosed for purposes of the FCA where the documents had never been actually requested nor viewed. *See United States ex rel. Schumer v. Hughes Aircraft*, 63 F.3d 1512 (9th Cir. 1995), *rev'd on other grounds*, *Hughes Aircraft v. United States ex rel. Schumer*, 520 U.S. 939 (1997).

Although the judgment in *Schumer* was vacated for other reasons, the public disclosure discussion, even if binding, is distinguishable. There, the relevant state regulation simply provided that the information "not specifically exempt from disclosure under the Freedom of Information Act shall, upon request, be made accessible to the public." 32 C.F.R. § 286.7(b). The *Schumer* court distinguished between "actual" and "theoretical" availability, and was thus of the

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[11] In *United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 72 F.3d 740 (9th Cir. 1995), the appellate court considered whether the relator, who had prepared a semiannual Inspector General's report as part of his job, was an original source. *Id.* at 743. In doing so it assumed with the parties—but did not decide—that a provision of the Inspector General Act of 1978 requiring the Inspectors General to prepare semiannual reports summarizing the activities of their offices and to furnish those reports to agency heads, Congress, and the public constituted a public disclosure.

Other discussions of the public disclosure provision by the Ninth Circuit are not dispositive because they address the very different problem presented by news media reports of fraud on the government which precede the filing of the qui tam complaint. *See, e.g., United States ex rel. Biddle v. Board of Trustees of Leland Stanford, Jr. University*, 161 F.3d 533 (9th Cir. 1998) (where relator personally discloses allegations to the media prior to filing suit, public disclosure bars FCA claim); and *United States ex rel. Devlin v. California*, 84 F.3d 358 (9th Cir. 1996) (relator informed news reporter of fraud allegations before filing complaint, and thus inquiry turned on the original source provision).

view that the information in that case was not "publicly disclosed" if it had not in fact been divulged under FOIA. *Id.* at 1519.

Here, in contrast, the statutes mandate disclosure. The surveys are made available to the public by operation of law. *See* 42 U.S.C. § 1395i-3(g)(5)(A)[12] and Cal. Health & Safety Code §§ 1280(e)[13] & 1439.[14] Thus, the federal Department of

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[12] The federal statute provides in relevant part:

> "Each State, and the Secretary, shall make available to the public—
>
> (i) information respecting all surveys and certifications made respecting skilled nursing facilities, including statements of deficiencies, within 14 calendar days after such information is made available to those facilities, and approved plans of correction, . . ."

42 U.S.C. § 1395i-3(g)(5)(A). It further provides that "[e]ach State shall provide its State medicaid fraud and abuse control unit (established under section 1396b(q) of this title) with access to all information of the State agency responsible for surveys and certifications under this subsection." 42 U.S.C. § 1395i-3(g)(5)(D). *See also* 42 C.F.R. § 488.325(a).

[13] The state statute relating to standards of care at health facilities provides:

> "All inspection reports and lists of deficiencies shall be open to public inspection when the state department has received verification that the health facility has received the report from the state department. All plans of correction shall be open to public inspection upon receipt by the state department."

Cal. Health & Safety Code § 1280(e).

[14] The state statute relating to long-term health care facilities states in relevant part:

> "Any writing received, owned, used, or retained by the state department in connection with the provisions of this chapter is a public record within the meaning of subdivision (d) of Section 6252 of the Government Code, and, as such, is open to public inspection pursuant to the provision of Sections 6253, 6256, 6257, and 6258 of the Government Code. However, the names of any persons contained in such records, except the names of duly authorized officers, employees, or agents of the state department conducting an

Health and Human Services (DHHS) has an affirmative obligation to publish the results of the mandatory state audits independent of any particularized requests. Moreover, the surveys must be publicly posted at the skilled nursing facilities. 42 C.F.R. 483.10(g)(1); and Cal. Health & Safety Code. § 1429(a) & (b). Here, the relators do not adduce any evidence disputing defendants' testimony that these surveys were actually posted as required. Glydon Decl. ¶¶ 4 & 5. Therefore, it is undisputed that the state surveys were actually disclosed.

b. *Federal Nature of the Administrative Reports*

Relators also contend that the state audits should not be deemed public disclosures under the Act because they are not "federal" in nature, and do not qualify as "allegations or transactions in a criminal, civil or administrative hearing, [or] in a congressional, administrative, or Government Accounting Office report." *See* 31 U.S.C. § 3730(e)(4)(A). I cannot agree.

A plain reading of the jurisdictional statute does not restrict the source of the publicly disclosed information to federal venues.[15] Rather, the statute read as a whole encompasses the

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investigation or inspection in response to a complaint filed pursuant to this chapter, shall not be open to public inspection and copies of such records provided for public inspection shall have such names deleted."

Cal. Health & Safety Code § 1439.

[15] Some courts have concluded that the "public disclosures" are limited to those allegations or transactions which have been disclosed in the venues strictly enumerated in the statute, *see, e.g., United States ex rel. LeBlanc v. Raytheon Co., Inc.*, 913 F.2d 17, 20 (1st Cir. 1990), and some have limited it to federal proceedings or investigations. *See United States ex rel. Givler v. Smith*, 760 F. Supp. 72 (E.D. Pa. 1991) (does not apply to information disclosed to city housing authority boards), and *United States ex rel. Garibaldi v. Orleans Parish School Board*, 21 F.Supp.2d 607, 614 (E.D. La. 1998) (local school board meeting not a "hearing" within the meaning of the Act). However, in the absence of binding judicial

publication of information originating from a variety of governmental and news media sources. Because federal law mandates that state agencies conduct regular audits of facilities receiving Medicare and Medicaid funding, *see* 42 U.S.C. § 1395i-3(g)(2)(A)(i) & 42 C.F.R. § 488.308(a), and that the audit be made public, the resultant administrative report would appear to be encompassed by the plain terms of the statute.[16]

ii. *The Allegations*

Having concluded that the state agency reports, General Accounting Office ("GAO") reports and news items proffered by defendants suffice as the kind of material enumerated by § 3730(e)(4)(A), defendants then argue that (1) these previously disclosed materials contain the same allegations of substandard care asserted by the relators in their complaint, and (2) the allegations of falsification asserted by the relators must be "based upon" the reports because the relators concede that they had no personal knowledge of falsification of records by any other means or from any other source. Put another way, defendants argue that because relators add nothing but speculation to the publicly disclosed materials, relators' allegations were "based upon" a public disclosure and thus barred by the jurisdictional statute.

The gravamen of relators' qui tam claim is that the management and staff at defendants' skilled nursing facilities

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interpretation of the terms of the statute, I must turn to the language of the statute itself. *See Tello v. McMahon*, 677 F. Supp. 1436, 1441 (E.D. Cal. 1988) (if neither the Supreme Court nor the Ninth Circuit has interpreted the statute, the court employs the traditional methods of statutory construction itself).

[16] Relators do not challenge whether the other evidence proffered by defendants--such as the General Accounting Office (GAO) reports and accounts in the news media—is of the type covered under the FCA public disclosure provision.

engaged in widespread and intentional falsification of patient records in order to conceal substandard service delivery, and thereby profit by receiving federal monies without having provided the requisite services. In support of their assertion that these allegations have been publicly disclosed, defendants point to the myriad administrative audit, GAO reports, and news media publications reporting multiple observations of substandard care at each of defendants' facilities.

Initially, I note that sporadic documentation of substandard care, without more, does not constitute a public disclosure of the alleged falsification of records. It has been explained that "qui tam actions are barred only when enough information exists in the public domain to expose the fraudulent transaction . . . or the allegation of fraud . . . ." *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994).[17] While the purported disclosure need not contain an explicit allegation of fraud, *Hagood v. Sonoma Water County Agency ("Hagood II")*, 81 F.3d 1465, 1473 (9th Cir. 1996), the disclosure must contain the elements of the fraudulent transaction. *See, e.g., United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 740 (3rd Cir. 1997). The issue is whether the publicly disclosed information "fairly characterizes" the kind of fraud or corporate policy alleged by the relators. *See Wang*, 975 F.2d at 1417.

Turning to the evidence adduced in the case at bar, the state audits, and the GAO and news reports cite occasional

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[17] The District of Columbia Circuit has been oft-cited for observing that:

> "[I]f X + Y = Z, Z represents the allegation of fraud and X and Y represent its essential elements. In order to disclose the fraudulent transaction publicly, the combination of X and Y must be revealed, from which readers or listeners may infer Z, *i.e.*, the conclusion that fraud has been committed."

United States ex rel. Springfield Terminal Ry. Co. v. Quinn, 14 F.3d 645, 654 (D.C. Cir. 1994).

instances of substandard or questionable care, along with several observations of inconsistent or suspect record-keeping in a patient's chart.[18] However, with one exception,[19] the GAO and news media reports do not name the facilities which are defendants in this lawsuit. Similarly, three governmental reports[20] all identified the prevalent falsification of patient records in skilled nursing facilities, but again do not specifically point to any of the hospitals named here. Thus, although these documents publicly disclose substandard care and generalized concern over accurate record-keeping, these documents standing alone do not raise a reasonable inference of a corporate pattern and practice of fraudulent billing for patient services not rendered.

B. "BASED UPON"

Defendants, however, carry the evidentiary challenge one step further arguing that the relators' allegations must have been "based upon" the state surveys, government hearings, and media reports because they have conceded that they have no independent knowledge of their allegations of fraud and falsification of patient records and Medicaid and Medicare billings. Defendants argue that because relators have pointed to nothing outside of the publicly disclosed state audits and

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[18] I concede that I have not read each of the 4000-plus pages of documents in the evidentiary record. Rather, because relators do not contest their contents, I have relied primarily upon the references provided by defendants in their summaries of the relevant evidence.

[19] The one exception includes a September 1995 article in the *Sacramento Bee* which names defendants Foothill Oaks Care Center, Hilltop Manor Convalescent Hospital, Lincoln Manor, and Roseville Convalescent Hospital as delivering substandard care, and which names Foothill Oaks Care Center as falsifying patient records.

[20] These reports include two from October 1982 and August 1983 by the Commission on California State Government Organization and Economy, and a June 1989 report on a Hearing before the Congressional Subcommittee on Aging.

media reports in support of their information or belief that defendants were engaged in fraud, the public disclosure provision bars jurisdiction.

In discovery, the relators stipulated that the Disclosure Statement which they submitted to the government at the time they filed their sealed complaint contained "substantially all material evidence and information the [relator] possesses" regarding the false claims allegations. *See* Stipulation Regarding Discovery Dispute, filed March 9, 1999 at 5:11-12. While the 154-page Disclosure Statement provides greatly detailed allegations of substandard medical care at defendants' facilities, the Statement reports no specific knowledge or information about falsification of records or fraud on the government. Even in a subsection of the Statement entitled "Examples of Company-Wide Falsifications and Non-Compliance," relators only generally plead that "[d]efendants have maintained, and continue to maintain, a company-wide custom and practice of falsifying the activities of daily living ('ADLs') for the various residents to conceal the lack of care and services required." Disclosure Statement at 147:22-25.

At deposition, both relators Baker and Herman conceded that they had no direct knowledge that any staff at any of the named facilities falsified patient records. At oral argument, the relators conceded that at the time they filed their sealed complaint and Disclosure Statement with the government, they possessed no independent knowledge of any falsification of records or fraudulent practices by the defendants. Rather, relators confirmed that their assertion of record falsification or company-wide fraud was based upon an inference drawn from the state audits and their own direct observations of substandard care.[21]

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[21] Although the relators argue that they conducted an independent investigation by personally going into the defendants' facilities and viewing the care and treatment delivered to patients, there is no evidence establishing that relators observed any falsification of patient records prior

In sum, relators have failed to adduce any substantive information regarding the false presentment of claims and have not offered any material information in this action which is not cumulative of that already publicly disclosed.

It is established that on a motion to dismiss, although an explicit allegation of fraud may not be publicly disclosed, without "substantive information about the particular fraud" the relators cannot survive. *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1473 (9th Cir. 1996); and *United States ex rel. Findley v. FPC-Boron Employees Club*, 105 F.3d 675, 688 (D.C. Cir. 1997). A relator may not simply speculate about the existence of a fraudulent transaction based upon publicly disclosed material. *See Findley*, 105 F.3d at 688. This jurisdictional limitation of FCA claims exists to discourage "opportunistic plaintiffs who have no significant information to contribute on their own." *United States ex rel. Devlin v. State of California*, 84 F.3d 358, 362 (9th Cir. 1996). Here, relators have not added any substantive information to that already in the public domain. *See Findley*, 105 F.3d at 688. Because relators have not come forward with any independent evidence to dispute that their allegations must have been "based upon" publicly available documents, the public disclosure provision bars their claims of fraud.

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to filing this complaint. Defendants adduce the transcripts of the depositions in which the defendants asked each relator if they had any knowledge of any of the defendants' facilities. With one exception, the relators had no such knowledge. As for the lone exception, relator Baker volunteered at Sierra Solano Health Care Center prior to the filing of this complaint, and alleged in the Disclosure Statement that she witnessed falsification of patient records while working there. However, at deposition she recanted this allegation, admitting that she had only seen a certified nursing assistant (CNA) delivering services without a patient chart, and did not know if the CNA actually falsified a medical record. *See* Baker Depo. at 138:11-139:9.

C. "ORIGINAL SOURCE"

Relators argue that if the public disclosure bar is triggered, then their claims should nonetheless survive because they were the "original source" of the information. I cannot agree.

Even if they could establish, as they allege, that they were responsible for reporting substandard care at some of the facilities to the state DHS, they have not overcome their burden to establish that their knowledge of the fraud or falsification is "direct and independent." *See* 31 U.S.C. § 3730(e)(4)(B); *and see Wang*, 975 F.2d at 1418. Second-hand information or knowledge not obtained through the relators['] own labor is insufficient to establish the original source exception to the public disclosure bar. *Devlin*, 84 F.3d at 361. Because, as discussed above, relators concede having no direct or independent knowledge of fraud or falsification at defendants' facilities, their claims under the False Claims Act cannot prevail.

V.

ORDER TO SHOW CAUSE

Defendants previously sought a continuance of the hearing on this motion after receiving the relators' opposition, contending that the relators relied upon declarations of witnesses who were not disclosed in discovery. The continuance was granted to allow defendants to conduct further depositions of these new witnesses, but the court ordered defendants to show cause why they had not propounded sufficient discovery requests on relators to uncover these witnesses before bringing the motion.

In response to the order to show cause, defendants recite a portion of the parties' stipulated discovery plan, in which the relators agreed that:

> "The Motion to Dismiss will thus be properly based *only* upon (1) what the Relators have testified to knowing in their depositions, when examined by the defendant; (2)

> the scope of any public disclosures which are, by their nature, already public; and (3) the Complaint, which determines what this action is 'based upon.'"

Stipulation Regarding Discovery Dispute at 14 (emphasis in original). Because of this agreement, defendants assert that they reasonably relied upon the deposition testimony of the relators. The stipulation, they argue, mooted any consideration of what relators' counsel may have know[n], as opposed to what the relators knew, and thus obviated the need for interrogatories inquiring about other witnesses or evidence outside the knowledge of the relators. In light of the agreement reached between the parties, defendants have established good cause why they did not propound discovery requests outside of those contemplated by the stipulation. The order to show cause shall be discharged.

VI.

CONCLUSION

It is well-established that federal subject matter jurisdiction must exist at the time the complaint is filed. *Morongo Band of Mission Indians v. California State Board of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988). Here, relators have adduced no reliable evidence to support their allegations that they had independent knowledge that defendants were engaged in falsification of records or other fraud on the government at the time they filed their complaint.

For the foregoing reasons the court hereby ORDERS that:

1. Defendants' motions to dismiss for lack of subject matter jurisdiction are GRANTED;

2. The court's order to show cause is DISCHARGED; and

3. The Clerk is directed to CLOSE the case.

IT IS SO ORDERED.

DATED: August 19, 1999.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge Emeritus
United States District Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
JUDGMENT IN A CIVIL CASE

CASE NUMBER: CIV S-97-548 LKK PAN

FOUNDATION AIDING THE ELDERLY *et al.*

v.

HORIZON WEST *et al.*

[Stamped "Filed Aug 20, 1999
Clerk, U.S. District Court
Eastern District of California"]

XX—Decision by the Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT JUDGMENT IS HEREBY ENTERED IN ACCORDANCE WITH THE COURT'S ORDER OF August 20, 1999.

Jack L. Wagner,
Clerk of the Court

ENTERED: August 20, 1999

by: [initials]
K. Heiser, Deputy Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. FOUNDATION AIDING THE ELDERLY, a California Non-Profit corporation; and MARSHA J. BAKER,

Plaintiffs,

v.

HORIZON WEST, INC., a California corporation; AUBURN MANOR, INC., a California corporation, *et al.*,

Defendants.

ORDER

[Stamped "Filed Jan 6, 2000
Clerk, U.S. District Court
Eastern District of California
By Deputy Clerk"]

This matter is before the court on relators' motion for reconsideration. I decide the motion on the pleadings and papers filed herein, and after oral argument.

I.
PROCEDURAL HISTORY

Relators, Foundation Aiding the Elderly ("FATE")[1] and Marsha Baker, bring this qui tam suit under the False Claims Act alleging that defendants Horizon West, Inc. and the corporate owners of thirty-nine other skilled nursing facilities engaged in a pattern and practice of falsifying medical records to conceal inadequate medical care.

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[1] FATE is a California non-profit corporation.

Pursuant to the parties' stipulation, the court's scheduling order provided that subject matter jurisdiction would be considered first, and therefore directed that during the initial phase the parties were to conduct all discovery necessary to fully resolve the jurisdictional issue. Defendants filed a motion challenging the court's subject matter jurisdiction over relators' claims.[2] For the reasons stated in its order, the court granted defendants' motion and dismissed the case.

Relators moved for reconsideration. The court heard oral argument on relators' motion on November 1, 1999. One month later, before the court issued a decision, relators filed a notice of appeal to the Ninth Circuit. Mistakenly believing it had lost jurisdiction, the court denied relators' motion for lack of jurisdiction. *See* Order filed December 8, 1999. Thereafter, the parties contacted the court and conveyed their understanding that, pursuant to Fed. R. App. P. 4, a district court retains jurisdiction to decide a motion for reconsideration even where the moving party files an appeal before the court has issued its ruling. Having reviewed Rule 4 and *Tripati v. Henman*, 845 F.2d 205, 206 (9th Cir. 1988), I agree. Accordingly, I now decide relators' motion for reconsideration.

II.

STANDARDS

"Under the 'law of the case' doctrine a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *United States v. Alexander*, 106 F.3d 874, 876 (9th Cir. 1997) (citing *Thomas v. Bible*, 983 F.2d 153, 154 (9th

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[2] In actuality, defendants noticed forty separate motions for dismissal—one brought by each individual defendant—in addition to a joint motion addressing all similar legal and factual issues. The relators opposed all forty-one motions with one joint motion.

Cir.), *cert. denied*, 508 U.S. 951 (1993)). Although motions to reconsider are directed to the sound discretion of the court, *see Kern-Tulare Water Dist. v. City of Bakersfield*, 634 F. Supp. 656, 665 (E.D. Cal. 1986), *aff'd in part and rev'd in part on other grounds*, 824 F.2d 514 (9th Cir. 1987), *cert. denied*, 486 U.S. 1015 (1988), considerations of judicial economy weigh heavily in the process. Thus, Local Rule 78-230(k) requires that a party seeking reconsideration of a district court's order must brief the "new or different facts or circumstances [which] were not shown upon such prior motion, or what other grounds exist for the motion." Generally speaking, before reconsideration may be granted there must be a change in the controlling law, facts or other circumstances, the need to correct a clear error, or the need to prevent manifest injustice. *Alexander*, 106 F.3d at 876.

As with motions to alter or amend a judgment made pursuant to Fed. R. Civ. P. 59(a), motions to reconsider are not vehicles permitting the unsuccessful party to "rehash" arguments previously presented, *see Costello v. United States Government*, 765 F. Supp. 1003, 1009 (C.D. Cal. 1991). Nor is a motion to reconsider justified on the basis of new evidence which could have been discovered prior to the court's ruling. *Fay Corp. v. BAT Holdings One, Inc.*, 651 F. Supp. 307, 309 (W.D. Wash. 1987), *aff'd*, 896 F.2d 1227 (9th Cir. 1990). Finally, "after thoughts" or "shifting of ground" do not constitute an appropriate basis for reconsideration. *Id.* These relatively restrictive standards "reflect[] district courts' concern for preserving dwindling resources and promoting judicial efficiency." *Costello*, 765 F. Supp. at 1009.

III.

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Defendants based their motion to dismiss on the public disclosure provision of the False Claims Act. 31 U.S.C.

§ 3730(e)(4)(A)-(B).[3] Under that provision, the court lacks jurisdiction over allegations based upon prior public disclosures of the same information, unless relators can establish that they are the original source of the publication.[4] *See United States ex rel. Hagood v. Sonoma County Water Agency ("Hagood I")*, 929 F.2d 1416, 1419-20 (9th Cir. 1991).

Defendants argued that the allegations of relators' complaint were previously disclosed by state agency reports, General Accounting Office reports and news media publications. Further, defendants argued that relators' allegations were based upon publicly disclosed information because they offered no material information which was not cumulative of that already disclosed by the above documents. Finally, defendants argued that relators' knowledge of the alleged fraud was not "direct and independent" of the publicly disclosed information and therefore that relators were not the original source of their allegations.

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[3] The Act provides:

> "(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, 'original source' means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."

31 U.S.C. § 3730(e)(4)(A)-(B).

[4] The public disclosure provision is said to be designed to avoid "parasitic" suits in which relators attempt to benefit from information already in the possession of the government. John T. Boese, *Civil False Claims and Qui Tam Actions*, at 4-32 (1998 Supplement).

The court disagreed with defendants' first argument: "[A]lthough these documents publicly disclose substandard care and generalized concern over accurate record-keeping, these documents standing alone do not raise a reasonable inference of a corporate pattern and practice of fraudulent billing for patient services not rendered." Order filed August 20, 1999. The court agreed, however, that relators' complaint failed to add any substantive information to that already in the public domain, *id.* at 20 (citing *United States ex rel. Findley v. FPC-Boron Employees Club*, 105 F.3d 675, 688 (D.C. Cir. 1997)), and that relators failed to demonstrate any direct and independent knowledge of the alleged fraud, *id.* at 21 (citing *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992)). Accordingly, the court granted defendants' motion to dismiss pursuant to the public disclosure bar.

IV.

GROUNDS FOR RECONSIDERATION

Relators move for reconsideration on two grounds: (1) given that relators' allegations were not previously disclosed by public documents, the court wrongly subjected their allegations to the "based upon" and "direct and independent knowledge" inquiries; and (2) even if the court properly subjected relators' allegations to the "based upon" inquiry, the court wrongly concluded that relators failed that test. Thus, relators assert reconsideration is proper because the court committed clear error. *Alexander*, 106 F.3d at 876. I address each ground for reconsideration seriatim.

First, upon reconsideration, the court realizes its error in holding that the allegations of relators' complaint were not publicly disclosed. Relators' complaint does no more than draw an inference of fraud from information previously disclosed in public documents. A relator adds no "substantive information," *United States ex rel. Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1473 (9th Cir. 1996), to that

already in the public domain when she merely assembles that information and draws inferences therefrom. "[W]here the public knows of information proving an allegation, it necessary knows of the allegation itself." *Wang*, 975 F.3d at 1418. Therefore, "fraud need not be explicitly alleged to constitute public disclosure." *United States ex rel. Harshman v. Alcan Electrical and Engineering, Inc.*, 1999 WL 795970 at *5 (9th Cir. Oct. 7, 1999). Accordingly, relators' allegations were previously disclosed by public documents, and the court properly engaged in the "based upon" and "direct and independent knowledge" inquiries.

Second, relators assert their allegations are not based upon publicly disclosed information because they did not review or rely upon public records in reaching their conclusion that defendants were committing fraud. I cannot agree. "[A] qui tam complaint filed after allegations have been publicly disclosed is, by definition, 'based upon' the publicly disclosed information." *Id.* As noted above, the allegations of relators' complaint were publicly disclosed before they filed their complaint. Therefore, relators' complaint is based upon publicly disclosed information.

V.

ORDERS

For all the foregoing reasons, the court hereby makes the following ORDERS:

1. Relators' motion for reconsideration is GRANTED; and

2. The court's order granting defendants' motion to dismiss is CONFIRMED.

IT IS SO ORDERED.

Dated: January 4, 2000

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
Chief Judge Emeritus
United States District Court

APPENDIX D

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA ex rel. FOUNDATION AIDING THE ELDERLY; MARSHA J. BAKER,
Plaintiffs-Appellants,

v.

HORIZON WEST INC., a California corporation; HERITAGE CONVALESCENT HOSPITAL; EMPRESS CONVALESCENT HOSPITAL; EMERALD DISTRIBUTING COMPANY, INC.; FAR WEST INC., a California corporation; LINWOOD GARDENS CONVALESCENT HOSPITAL, INC., a California corporation; MID-VALE CONVALESCENT HOSPITAL, INC.; SACRAMENTO CONVALESCENT HOSPITAL, INC., a California corporation; SOUTH GATE CARE CENTER INC., a California corporation; VALLEJO CONVALESCENT HOSPITAL, INC., WESTGATE GARDENS CONVALESCENT CENTER, INC.; MONTEREY BAY CONVALESCENT HOSPITAL, INC.; SIERRA MEDICAL ENTERPRISES INC. SIERRA MEDICAL ENTERPRISES, INC. dba Grass Valley Convalescent Hospital; EL DORADO CONVALESCENT HOSPITAL INC.; FOOTHILL OAKS CARE CENTER INC.; HILLTOP MANOR CONVALESCENT HOSPITAL INC.; LAKEPORT SKILLED NURSING CENTER INC.; LINCOLN MANOR INC.; LIVE OAK MANOR INC.; MEADOW VIEW MANOR INC.; MONTEREY PINES SKILLED NURSING FACILITY INC.; NAPA NURSING CENTER INC.; PLACERVILLE PIES [*sic*] CONVALESCENT HOSPITAL INC.; ROSEVILLE CONVALESCENT HOSPITAL INC.; SIERRA HILLS CARE CENTER INC.; SUNNY HILLS CONVALESCENT HOSPITAL

INC.; VALLEY VIEW SKILLED NURSING FACILITY INC.; WALNUT WHITNEY CONVALESCENT HOSPITAL INC.; SIERRA SOLANO CARE CENTER INC.; WESTCARE MANAGEMENT INC.; FOUR CORNERS REGIONAL CARE CENTER INC.; PARKDALE CARE CENTER INC.; RED CLIFFS REGIONAL INC.; HORIZON WEST INC.; PACIFIC WEST PHARMACY INC., California corporations; ELLEN L. KUYKENDALL; BERNICE SCHRABECK; MICHAEL MCDONALD; MILTON HARMON; AUBURN MANOR INC., dba Golden Empire Convalescent Hospital dba Parkview Nursing Center; MEDICREST OF CALIFORNIA INC., dba Medical Center Convalescent Hospital; MEDICREST OF CALIFORNIA INC., dba Arlington Gardens Convalescent Hospital dba Montclair Manor Convalescent Hospital; WHITEHALL CONVALESCENT HOSPITAL INC., dba Wellesley Manor Convalescent Hospital; SIERRA HEALTH CARE MANAGEMENT CORPORATION dba Sierra Health Care Convalescent Hospital; SANDY REGIONAL INC., Sandy Regional Convalescent and Rehabilitaion [*sic*] Center

Defendants-Appellees.

No. 99-17539
DC No. CV-S-97-548-LKK

[Stamped "Filed Dec 21 2001
Cathy A. Catterson, Clerk
U.S. Court of Appeals"]

ORDER

Before: REINHARDT, TASHIMA, and BERZON, Circuit Judges.

The opinion filed on September 13, 2001, and reported at 265 F.3d 1011, is amended, as follows:

Slip op. at 13218, 265 F.3d at 1014, the statutory citation at the end of footnote 2 is corrected to read: "31 U.S.C. § 3730(e)(4)(A)."

Slip op. at 13222, 265 F.3d at 1016, in the last paragraph of Part II.C, third sentence, substitute "To put it somewhat differently," for "To put is somewhat differently,".

Slip op. at 13223, 265 F.3d at 1016, in Part II. D, fourth sentence, substitute "We do not dispute Appellees' assertion" for "We do not dispute Appellants' assertion".

The panel has voted to deny the petition for panel rehearing and for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(b).

The petition for panel rehearing and the petition for rehearing en banc are denied.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 99-17539
CT/AG#: CV-97-00548-LKK

UNITED STATES OF AMERICA ex rel. FOUNDATION AIDING THE ELDERLY; MARSHA J. BAKER,
Plaintiffs-Appellants,

v.

HORIZON WEST INC., a California corporation; HERITAGE CONVALESCENT HOSPITAL; EMPRESS CONVALESCENT HOSPITAL; EMERALD DISTRIBUTING COMPANY, INC.; FAR WEST INC., a California corporation; LINWOOD GARDENS CONVALESCENT HOSPITAL, INC., a California corporation; MID-VALE CONVALESCENT HOSPITAL, INC.; SACRAMENTO CONVALESCENT HOSPITAL, INC., a California corporation; SOUTH GATE CARE CENTER INC., a California corporation; VALLEJO CONVALESCENT HOSPITAL, INC., WESTGATE GARDENS CONVALESCENT CENTER, INC.; MONTEREY BAY CONVALESCENT HOSPITAL, INC.; SIERRA MEDICAL ENTERPRISES INC. SIERRA MEDICAL ENTERPRISES, INC. dba Grass Valley Convalescent Hospital; EL DORADO CONVALESCENT HOSPITAL INC.; FOOTHILL OAKS CARE CENTER INC.; HILLTOP MANOR CONVALESCENT HOSPITAL INC.; LAKEPORT SKILLED NURSING CENTER INC.; LINCOLN MANOR INC.; LIVE OAK MANOR INC.; MEADOW VIEW MANOR INC.; MONTEREY PINES SKILLED NURSING FACILITY INC.; NAPA NURSING CENTER INC.; PLACERVILLE PIES [*sic*] CONVALESCENT HOSPITAL INC.; ROSEVILLE CONVALESCENT HOSPITAL INC.; SIERRA HILLS CARE

CENTER INC.; SUNNY HILLS CONVALESCENT HOSPITAL INC.; VALLEY VIEW SKILLED NURSING FACILITY INC.; WALNUT WHITNEY CONVALESCENT HOSPITAL INC.; SIERRA SOLANO CARE CENTER INC.; WESTCARE MANAGEMENT INC.; FOUR CORNERS REGIONAL CARE CENTER INC.; PARKDALE CARE CENTER INC.; RED CLIFFS REGIONAL INC.; HORIZON WEST INC.; PACIFIC WEST PHARMACY INC., California corporations; ELLEN L. KUYKENDALL; BERNICE SCHRABECK; MICHAEL MCDONALD; MILTON HARMON; AUBURN MANOR INC., dba Golden Empire Convalescent Hospital dba Parkview Nursing Center; MEDICREST OF CALIFORNIA INC., dba Medical Center Convalescent Hospital; MEDICREST OF CALIFORNIA 1 INC., dba Arlington Gardens Convalescent Hospital dba Montclair Manor Convalescent Hospital; WHITEHALL CONVALESCENT HOSPITAL INC., dba Wellesley Manor Convalescent Hospital; SIERRA HEALTH CARE MANAGEMENT CORPORATION dba Sierra Health Care Convalescent Hospital; SANDY REGIONAL INC., Sandy Regional Convalescent and Rehabilitaion [*sic*] Center

Defendants-Appellees.

[Stamped "Filed Jan 16 2002" by the "Clerk, U.S. District Court, Eastern District of California, By [Initials] Deputy Clerk"]

APPEAL FROM the United States District Court for the Eastern District of California (Sacramento).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of California (Sacramento) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of said

District Court in this cause be, and hereby is reversed and remanded.

Filed and entered: September 13, 2001

[Stamped "A True Copy Attest Jan 14 2002 Cathy Catterson Clerk of Court by [initials] Deputy Clerk. This certification does constitute the mandate of the court."]